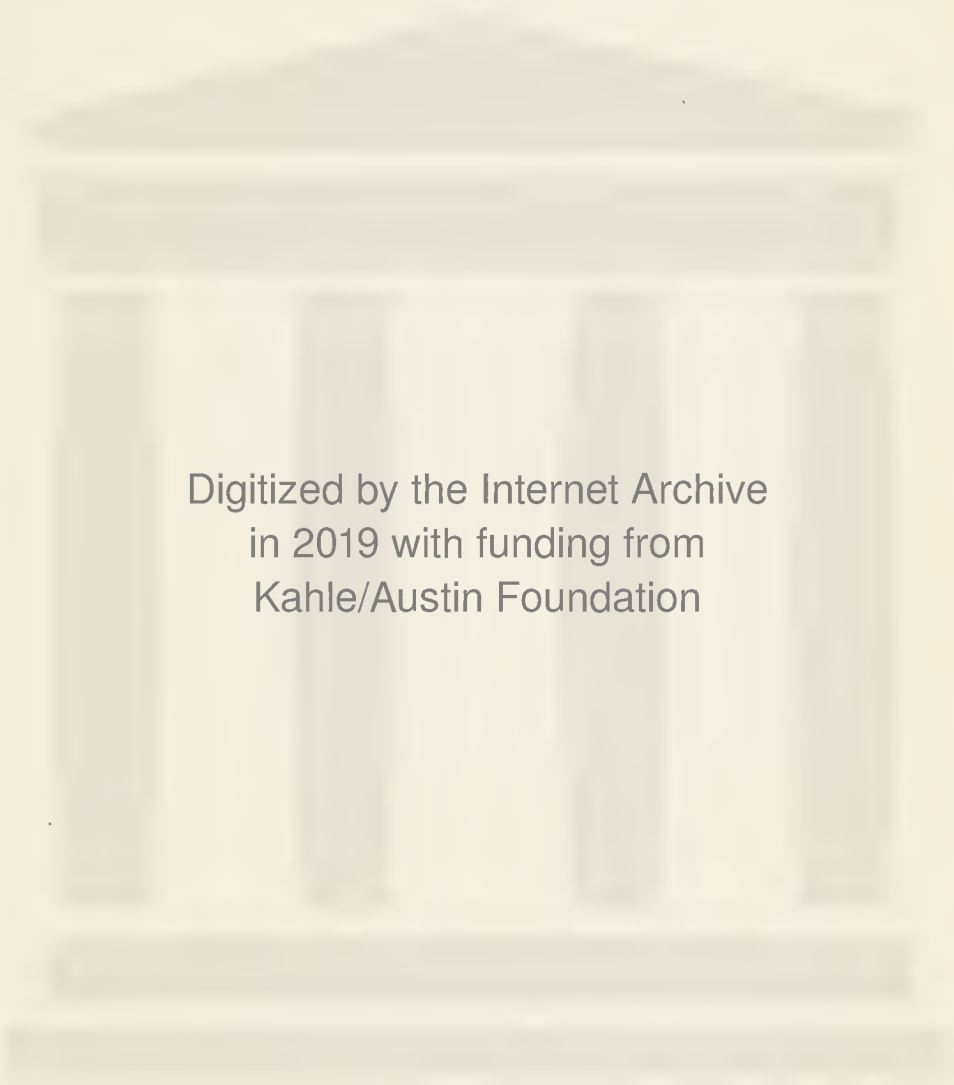

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW

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EDWARD ARTHUR WHITTUCK [1]

THE study of international law in Great Britain has lost a true friend, and this Year Book a founder and a generous supporter in Edward Arthur Whittuck, who died on March 10, 1924. He was born on May 11, 1844, the second son of J. Whittuck Whittuck, of Hanham Hall, Gloucestershire; and was educated at Eton (1857–62), and Oriel College, Oxford, where he graduated in the first class of the then combined School of Law and History. His family had destined him for the Bar, but he preferred to stay in Oxford. At first he took private pupils; but in 1875 he was appointed to a lectureship in law at Oriel, and from that date until his marriage in 1892 he resided in Oriel, living a quiet regular life, working with his pupils, and steadily pursuing his own studies, which gradually became concentrated on Roman Law. He edited the third edition of Poste's *Institutes of Gaius*, and contributed the articles on Roman Law to Smith's *Dictionary of Antiquities*. One who knew him well in those Oxford days describes him as "a man of accurate mind, careful in statement, and when roused by a clever pupil almost inspiring; but, as a rule, he was shy and uncommunicative." He took a deep interest in the problems of legal education, then only beginning to be seriously regarded in Oxford; and to the end of his life he remained one of the most regular attendants at the terminal meetings of the Oxford Law Club.

In 1892 he married the Hon. Frances Butler, daughter of Lord Mountgarret. His marriage introduced him to a wider circle of acquaintances and interests. He gave up his teaching work, and left Oxford to live in London; later he divided his time between London and his country house of Claverton Manor, near Bath. But he maintained his interest in his own work as a student, and in the promotion of legal studies; in the latter his interest more than once took the practical form of generous financial support.

[1] The photograph of Mr. Whittuck which forms the frontispiece to this volume is reproduced by the courtesy of Messrs. Elliott & Fry.

Whittuck had always been interested in political affairs; he was a strong Liberal, and might have been attracted to a public career but for his almost excessive natural reserve. After he left Oxford he began to take an ever deepening interest in international law, which appealed to his mind largely because he was profoundly convinced of its great importance as a power for good in politics. The subject gradually came to occupy the first place in his affections, and the advent of the war turned his interest into a devoted and enthusiastic faith. Coming, as he did, somewhat late in life to the study of the subject, he naturally wrote little; though he published *International Documents*, a collection of international law-making conventions, in 1908, essays on *International Law Teaching* in 1917, and on *A Court of International Justice* in 1919, *International Canals*, one of the Foreign Office Peace Handbooks, in 1920, and a memoir of his friend, Professor Oppenheim, in the Year Book for 1920–1. But it was mainly by his own enthusiasm and by his liberality that he sought to foster a wider interest in the study.

Whittuck was for many years one of the Governors of the London School of Economics and Political Science, in the development of which he took a deep interest. It was in that capacity that he was instrumental in obtaining the appointment of the late Professor Oppenheim to a lectureship there. The two had been friends for some time, and Whittuck realized the great opportunity for the advancement of the study of international law in England which was afforded by Oppenheim's settlement in England, by obtaining the services of one who had already made for himself a name as a teacher of law in the German and Swiss Universities, and who was desirous of devoting himself solely to international law. Whittuck's interest in the teaching of international law in London after Oppenheim's appointment was real and continuous, and his great desire was to see a well-endowed Chair in the subject established in the University. He was an active member of the Law Faculty in the University, and was successful in securing a fuller recognition of international law in the curriculum for the London Law degree. He also founded the Whittuck scholarship, open to students of law or economics taking international law as a selected subject. It was largely due to the negotiations which he undertook with the London School of Economics that the Edward Fry Library of International Law, of which he was one of the original trustees,

is at present housed there. He was also one of the original members of the Grotius Society, founded in 1915.

Of his valued work in connexion with the founding of this Year Book, and on the Editorial Board, it is unnecessary to speak in detail; but it is of interest to place on record that it was at his house in South Audley Street that the early meetings of those interested in the project were held.

By his will he has made generous provision for the future maintenance of the Year Book and has left a bequest of books and a sum of money to the Edward Fry Library of International Law.

"A warm-hearted, loyal, affectionate man, behind a shield of reserve," is the tribute of an Oxford friend.

A. P. H.

J. L. B.

THE SHORTCOMINGS OF INTERNATIONAL LAW

By Professor J. L. BRIERLY, O.B.E., M.A., B.C.L.,
Chichele Professor of International Law and Diplomacy at Oxford.

INTERNATIONAL lawyers to-day will do well not to forget the words of Grotius : " Non desunt et olim non defuerunt qui hanc juris partem ita contemnerent quasi nihil ejus praeter inane nomen existeret ; " for it is a disquieting thought that after three hundred years of the progress of the science the same criticism should be heard to-day. It suggests at least that it may be profitable to consider whether any justification for it, however inadequate, exists. Whether fairly or not, the world regards international law to-day as in need of rehabilitation ; and even those who have a confident belief in its future will probably concede that the comparatively small part that it plays in the sphere of international relations as a whole is disappointing.

Much discussion, informed and otherwise, has ranged around the condition and prospects of the subject in the years since 1914 ; and there has been a strong tendency to consider that a prime cause of its weakness is the absence of an effective sanction by which its rules can be enforced. Certainly it is hardly to be expected that a system of law without effective machinery for coercing the law-breaker should be strong ; for however true it may be that mere machinery cannot supply the want of a law-supporting public opinion, it is equally true that opinion can only exert its full effect through appropriate machinery. It is therefore with no thought of depreciating the importance of giving greater definition to the sanctions of international law that it is suggested that there are deeper causes of its weakness, and that these have been somewhat obscured by the concentration of emphasis on the need of providing means to enforce it. We need a correct diagnosis of the disease before we prescribe the medicine, and we should not overlook the danger of mistaking symptoms for causes.

It would seem that those who lay chief stress on the need of enforcing international law must whether they consciously

formulate them or not, make two assumptions as to its character. One is the assumption that the law is weak at present because it is frequently broken with impunity; the other that in the system as we have it there exists a set of rules and principles for the conduct of States which are in themselves well adapted to State needs, so that all would be well if only States could be persuaded or compelled to make their actions conform to the system. But it is submitted that both these assumptions, so far from being self-evident truths, ought to be seriously challenged. Of course it is true that the rules of international law are not always observed, but neither are those of municipal law; and if we exclude in this context, as we fairly may, that part of the laws of war which professes to regulate the relations between belligerents, it seems doubtful whether it would be safe to affirm that actual breaches of international law are much more frequent than those of municipal law. The common opinion that they are so is possibly due, partly to the absence generally of any authoritative statement of what the rules are, but even more to the fact that the world at large only turns its attention to the subject on the rare occasions on which some State commits some particularly flagrant breach of the law; so that the observance of the law by States, which is the rule and not the exception, tends to pass unnoticed.

Far more serious than the occasional breaches of the law by States, and calling for the earnest attention of all who are interested in the study of the subject, is the fact that the conduct of States relegates international law to a wholly subordinate position in international relations. The recent advisory opinion of the Permanent Court of International Justice in the dispute between Great Britain and France as to the Tunis and Morocco Nationality Decrees [1] contains a significant reminder that present international law regulates not the whole, but only a part, of the sphere of international relations. A matter which is intrinsically international, in the sense that it affects the interests of more than one State, is not by that fact alone brought within the domain of international law; it may well remain within the sole jurisdiction of one of the parties concerned. The Court had to consider the meaning of paragraph 8 of Article 15 of the Covenant of the League of Nations, which precludes the Council of the

[1] *Collection of Advisory Opinions*, No. 4. See also *British Year Book of International Law*, 1923–4, pp. 175–8.

League from making a recommendation as to the settlement of a dispute which arises " out of a matter which by international law is solely within the domestic jurisdiction " of one party, and the following passages occur in the opinion :

" The words ' solely within the domestic jurisdiction ' seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State, are not, in principle, regulated by international law. As regards such matters, each State is sole judge. The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain."

In a later passage the Court says :

" It is certain . . . that the mere fact that a State brings a dispute before the League of Nations does not suffice to give this dispute an international character . . .

It is equally true that the mere fact that one of the parties appeals to engagements of an international character in order to contest the exclusive jurisdiction of the other is not enough to render paragraph 8 inapplicable "—

unless, as the Court goes on to say in effect, the legal grounds relied on are such as to justify the provisional conclusion that they are of juridical importance for the dispute, in which case—

" the matter, ceasing to be one solely within the domestic jurisdiction of the State, enters the domain governed by international law."

This division of matters which concern the interests of more than one State into two kinds, those which are regulated by international law and those which belong to a " reserved domain," is doubtless not new ; under different terminology it has long been familiar as the basis of the distinction between justiciable and non-justiciable disputes, and of the common reservation in arbitration treaties of differences which affect the " vital interests, the independence, or the honour " of the contracting States. Moreover it is probably not possible, and certainly not desirable, that every matter, simply because it concerns the interests of more than one State or person, should be treated by law as justiciable ; there must always remain both in international and in municipal law cases in which " damnum " is " sine injuria." Nor is this article intended in any way to suggest that law ought to or ever can do the work which at present belongs to diplomacy ; it is just as inconceivable that legal process should become the

habitual method of settling international differences as that private differences between individuals should habitually be settled by that means. The problem which seems to demand the consideration of international lawyers is not the existence of a sphere of international relations into which the law may not enter, but its extent; for unfortunately the great majority of the differences for the sake of which States are prepared to resort to war fall within the "reserved domain." If the establishment of the rule of law between nations is to be anything but the vague aspiration of the idealist, if international law is ever to be more than a convenient means of settling disputes of minor importance or of facilitating the routine of international business—services which, valuable as they are in themselves, are not the highest of which it ought to be capable—it can only be by the progressive diminution of the extent of this "reserved domain," and the annexation of part of it at any rate to the domain of law.

It is tempting, perhaps, to dismiss the problem so stated by objecting that the restricted domain of international law is merely the reflection in the juridical sphere of the strength of national particularism in the political; criticism therefore would be wasted, since the law can only accept the unfavourable conditions in which it has to do its work. Certainly it would be foolish to underrate the strength of the obstacle that nationalism presents to the growth of a more coherent international society or a stronger international law. The obstacle can only be overcome by the slow growth of a higher international sense, a consummation to which lawyers can contribute only in the same measure as any other men, and which therefore need not be discussed here. But this does not seem to be the whole explanation of the restriction of the sphere of law. That complex of sentiments and interests which make up the feeling of nationality is in large part an irrational force; but it is not wholly so. It is partly based on a calculation of interests, and to that extent it may be amenable to argument. We may grant that every State wishes to see its own interests protected; yet to believe that States actually prefer the protection of their interests by extra-legal means, rather than by law, if the choice is offered, would be an exaggerated cynicism for which there is really no warrant to be found in the behaviour of States. Moreover, the assumption that there is something in the sentiment of nationality which is

inherently opposed to an expansion of the field of international law is one that ought not to be too lightly accepted. No doubt occasion comes to every State when it finds in the existence of the "reserved domain" a convenient juridical basis for some act of national assertiveness which injures the interests of its neighbours, or offends the common sense of right among nations. But, as this article will attempt to show, States in their normal relations neither claim for themselves, nor recognize in others, that wide freedom to act without taking account of the interests of other States which the theory of the law concedes to them. In truth the "reserved domain" is far narrower in the practice than it is in the theory of international relations. Even, however, if national feeling were a much more formidable obstacle to the development of the law than it probably is, it would still, it is submitted, be unreasonable to assume that all prospect of a change in the attitude of States towards law must wait upon a change in the psychology of States, without having considered whether something may not be done to make the law more responsive to their needs. Law, after all, is only a means to an end, and that end is to assist in solving the problems of the society in and for which it exists. Only to a small extent, and hardly at all in international law, can a society be confined within a legal mould that does not meet its needs, or what its prevailing opinion conceives to be its needs; and when we find, as we do, that in spite of widespread aspiration towards a better international order, every State still shrinks from committing its more important interests to the arbitrament of international law, it is surely permissible to inquire whether all the fault lies on the side of the States, or whether it may not partly lie in the quality of the law that they are invited to accept.

"The legal order," as Professor Pound has recently written,[1] "must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in the actual life which it is to govern. If we seek principles, we must seek principles of change no less than principles of stability." And in another passage he quotes Kohler's view of the twofold task of law: it must maintain existing values of civilization; it must also create new ones. The suggestion may be hazarded that international law has in great part neglected one side of this twofold function; it has aimed at stabilizing without

[1] *Interpretations of Legal History*, pp. 1, 144.

sufficiently providing for the growth of international society; it has attempted to maintain existing values, but rarely to create new ones.

The society of States is not static; changes are perpetually taking place within it, and the only certain thing about its future is that it will continue to change. What, however, is doubtful is whether the changes of the future are destined to be worked out within or without the framework of international law. At present practically all the major changes are worked out without it. It would be instructive to take the map of Europe as the Treaty of Vienna left it and to consider how many of the changes that had taken place in it before the end of the nineteenth century took place or could conceivably have taken place within the international legal system. Some of those changes may have been neither inevitable nor desirable; but that great changes in the Vienna settlement would in the course of a century be both inevitable and desirable can hardly be doubted. Yet, humanly speaking, it was impossible that they should be brought about except by means either illegal or at least extra-legal.

Within any well-ordered modern State the process of adapting the law to new conditions is perpetually going on. In part, in modern times, it is a conscious process operating through legislation, through judicial decisions, or through juristic interpretation; in part it is a more subtle process. But international law lost the most fruitful seed of development that it has ever had when, far too early for the health of the system, though doubtless inevitably, its foundation in natural law was undermined. With the triumph of the positive school the problem of development became immensely more difficult, for the system possesses hardly any of the apparatus of change that exists within a municipal system. Not only has it no legislature, and until recently no courts; but even the spontaneous growth of a new customary rule is incomparably more difficult than it is within the community of a State. For the society of States is numerically small; the bonds between them are still much weaker than those between individuals in a State, and though international intercourse grows closer every day, it has to be remembered that the growth is mainly in intercourse between the individuals of different States and not between the States themselves; the relations of States with one another are not constant but intermittent, and they form only a part of the whole

of a State's life. All these are factors which keep the juridical sentiment between States weak, and thus render the evolution of a new customary rule in modern conditions a rare event.

Moreover, to the difficulties arising out of the immaturity of international society there has been added another in the attitude towards law inspired by the codifications of the nineteenth century. M. Alvarez [1] has pointed out that the codification of the civil law had a marked influence on the manner in which jurists conceived of the relation between States; it led to the notion that there exist precise and unchangeable rules which ought to govern international intercourse. He complains that the literature of the subject devoted itself to expounding these rules, without perceiving that it was really giving itself up to rational speculation; with the result that when States, often for absolutely good reasons, did not observe the rules, the jurists failed to see, as they should have done, that the principles of international law are not susceptible of precise formulation; and instead of searching for the motives of general policy which explain the conduct of States, they confined themselves to censure. And yet, as M. Alvarez points out, apart from treaties international law is a customary law not only in its origin and its development, but also in the inspiration that it draws from the political situation of the age, and its rules are (or at any rate they ought to be) constantly changing and modelling themselves on the ever-changing needs of international life. It was a disaster that the acceptance of this attitude towards law should have coincided with the beginning of a century which was to be one of unprecedented growth in the society of States.

But, however great the difficulties may be, the problem of restoring an active principle of growth to international law is insistent. Its want brings discredit on the system; on the one hand it practically compels States to relegate the law to a status of minor importance in international intercourse; and on the other hand it tempts the jurist, naturally dissatisfied with this result, to escape from it by admitting the importation into the system of essentially unjuridical doctrines. Thus because it is impossible not to see that States do not consider that the law sufficiently protects their vital interests, we get an alleged "right of self-preservation," which even so generally sound a writer as W. E. Hall describes as "a governing condition

[1] *Nouvelle conception des études juridiques*, pp. 47–50.

subject to which all rights and duties exist." Because it is clear that State life cannot be compressed within the bonds of perpetually and absolutely binding treaties we get the extravagances of the doctrine of the " clausula rebus sic stantibus." Because we have attempted to give too great precision to the rules of war, we get the doctrine of military necessity. Worst of all, perhaps, we are almost forced to admit, though the conscience of jurists naturally shrinks from the admission, that a new rule of law is sometimes established by the breaking of an older one that circumstances have rendered obsolete.

In one field of international intercourse, which may roughly be called the economic or social, as distinguished from the political field, it must be admitted that the law has developed a considerable capacity for adapting itself to changed conditions by the quasi-legislative process of international conventions. The interests of commerce have largely prevailed over national particularism in such matters as postal and telegraphic communication, railway transport, and river navigation; and the movement on this side has been greatly accelerated in the last few years by the very numerous conventions promoted by the League of Nations. Even on the political side there are recently hopeful signs. Certain provisions of the Covenant, especially Article 11 (declaring that any circumstance which threatens to disturb peace or good understanding between nations may be brought to the attention of the League by any Member), and Article 19 (relating to the right of the Assembly to advise the reconsideration of treaties which have become inapplicable and the consideration of dangerous international conditions), show that the problem of change is recognized, if it is not solved. There is also every hope that the new Court will give us in time a body of judge-made law; it has already, in the only judgment (as distinguished from advisory opinions) so far reported, given judicial recognition to a new custom of very recent growth relating to international canals.[1] But in spite of these hopeful elements in the present outlook it seems doubtful whether the political problem can be met except by the reconsideration and restatement of some of the fundamental postulates of the law.

It is impossible within the limits of this article to do more than suggest the line which such reconsideration might take.

[1] *Collection of Judgments*, No. 1. *The Affair of the S.S. Wimbledon*; see especially p. 28.

There is urgent need, for example, that we should consider, without any prepossession in favour of the traditional significance of the words, what exactly the "sovereignty" or "independence" of States means in modern conditions. State sovereignty is primarily not a legal, but a philosophical conception; it is, as a recent writer [1] very truly says, a doctrine—

"which political scientists invented, developed to extreme proportions, set loose in the world in a day when we were leaders of political thought, and left by our abdication of the task of leadership in these later days unsupported by any complementary doctrine of international solidarity."

Lawyers have been too prone to treat it as an arid dogma, in spite of the fact that their science professes to be positive, having for its subject-matter "the rules or usages which civilized States have agreed shall be binding upon them." Yet "sovereignty" or "independence" is not an entity existing apart from the facts of State life; and the words can only have a meaning for international law in so far as they are merely compendious designations of certain qualities of modern Statehood. But we need hardly look at the facts of State life to see that either word contains and must always have contained a dangerous *suggestio falsi*.

The notion at the root of "sovereignty" is superiority, which may be an appropriate notion when the internal life of the State is under analysis, but to which it is difficult to give a meaning when we are examining the relations of State to State; and "independence," as Westlake pointed out, is a negative word and therefore one that does not admit of degrees, and it would if used literally imply the impossibility of international law altogether. It is clear therefore that the words must always have been used by international lawyers in some secondary derivative sense. But it is even more important to recognize that, as the bonds of international society have become closer, the words have changed, and are continually changing, their content.

Now, if it were true that the consequences commonly deduced from the doctrine of State sovereignty were merely statements of rules or usages accepted by States in their dealings with one another, lawyers could only accept them; but actually they go far beyond this. For example, in any doctrinal discussion of sovereignty in its territorial aspect, the right of a sovereign State to dispose of its own territory without recognizing the interest

[1] Pitman B. Potter, in the *American Political Science Review*, August, 1923.

of other States in the transaction must be conceded. Yet in practice it is notorious that such a right can hardly ever be exercised. Holland in 1867 found that she could not sell Luxemburg to Napoleon III; Denmark could certainly not have sold her West Indian islands to any purchaser other than the United States.[1] It may be said that the right of disposition is illusory in such cases as these merely because of the practical difficulty of enforcing it against a powerful State that feels its interests to be affected, but that it exists juridically none the less; but surely the reason lies deeper. In ultimate analysis what makes it possible for John Doe in England to convey Blackacre to Richard Roe is not that they can call in a policeman to arrest any one who interferes with the transaction, but that freedom of alienation for owners is supported by the opinion of English society. But freedom of alienation for States is not supported by the general opinion of States, they normally regard the alienation of territory as a matter of general concern, as one that falls outside, and not, as the law persists in regarding it, inside the "reserved domain;" and the supposed absolute right of a State to alienate its own territory is a fiction which is suggested to us, not by anything in the practice of States, but by our preconceived notions of what sovereignty ought to imply. It would be easy to show by other illustrations that the text-book conception of sovereignty has become to-day an "idolon theatri," bearing little resemblance to the actual position of States in their relation to one another. We are faced with the paradox of a system of law, professing to consist of principles universally recognized, but insisting on the universal application of rules which the conscience of the world obstinately refuses to accept as universally applicable. "The first rule we will lay down," says Dr. Lawrence, speaking of the doctrine of territorial sovereignty, "is that a State has jurisdiction over all persons and things within its territory." As a statement of accepted theory, that is indisputable; but surely we deceive ourselves if we believe that it represents a rule which States have impliedly agreed to recognize. On the contrary there is probably no State which is prepared in all circumstances, or subject only to the exceptions usually stated, to disinterest itself in the treatment that any other State may adopt towards persons or things within its territory. The

[1] Cf. an article read by Jesse S. Reeves before the American Conference on the Judicial Settlement of International Disputes, 1915.

United States did not admit that the government of Cuba was a matter which solely concerned Spain; Great Britain did not regard the Uitlander question as one on which only the views of the South African Republic should be heard; Austria refused to be indifferent to the internal affairs of Serbia; and the Peace Treaties have recently, in the articles for the protection of minorities, given a tardy and still very imperfect legal recognition to the obstinate fact that there are circumstances arising out of the nature of modern international society in which States will certainly refuse to conform to the traditional absolutist theory of the independence of sovereign States in this regard. When this country recently declared its recognition of the sovereignty of Egypt, Zaghlul Pasha made a speech in which he accused us of hypocrisy;[1] and if we meant to imply that we were prepared to recognize Egypt as sovereign in the text-book sense, he was right, since it was notorious that we proposed to require security that Egyptian sovereignty should not be capable of being used against certain interests which we regarded as vital. But the truth seems to be that in this incident we had merely made explicitly a reservation such as is implicit in the recognition of sovereignty that any State accords to any other.

If it is objected that such reservations belong to the sphere of politics and not of law; that any rule of law is liable to be set aside by those who have the power; that on occasions it may be morally justifiable to disregard the law; that in any case a legal rule ought not to be changed to meet exceptional circumstances; the answer surely is that in modern conditions the circumstances are not exceptional but normal, that the rule itself, as stated, has really disappeared, and that all that remains to do is to correct the statement of it. For international practice, though not yet the law which purports to be derived from it, has grafted on to the traditional doctrine of sovereignty a principle of qualification; and it remains only for jurists to translate into juridical form something that is already implicit in the practice of States. What that form should be it would be rash even to suggest here, but it seems conceivable that some analogy may be found in the qualifications imposed on ownership by municipal law. The law of nuisance in English law, or the principle of "abus du droit" of some continental systems, might possibly prove fruitful subjects for exploration. At any

[1] *The Times*, September 22, 1923.

rate it ought not to be an impossible task to formulate a juridical distinction between those national interests which a common sense of right among nations regards as entitled to be protected and those which are merely the extravagances of an anti-social nationalism. If the law admitted of the realization of the former by legal means, the latter might become a more easily manageable problem, and the question of devising means of enforcing the law might then be undertaken in the reasonable expectation that international opinion would be found on the side of the law; and the discredit that falls on a law which is sometimes, if not actually honoured, at least condoned, in the breach, would be avoided. There can be no sure foundation for international law other than that on which Lord Mansfield, who knew the need for law to grow if ever a judge did, based it when he wrote that it is "founded on justice, equity, convenience, and the reason of the thing, and confirmed by long usage." For its principles can be found only by examining what it is that States to-day regard as just, equitable, convenient, reasonable; they cannot be deduced from what they so regarded a century ago, and still less from any pseudo-metaphysical notions of what the essential qualities of Statehood ought to be.

Another traditional doctrine which urgently needs consideration is that of the binding force of treaties. On the one hand there lies the danger of anything that might seem to weaken the obligation of good faith between nations; on the other hand incidents like the Russian repudiation of the Black Sea clauses of the Treaty of Paris in 1871, or the Austrian and Bulgarian violations of the Treaty of Berlin, surely show that it is hopeless to look for the perpetual observance of treaties whose terms have ceased to accord with international ideas of what is right. For in each of these three cases, however deplorable the method may have been, it would probably be generally admitted that it was right that the State concerned should be released from the treaty obligations that were in question. Yet in 1871, when the Powers met in London and condoned the Russian action, they attempted to conceal their humiliating position by an edifying, but in the circumstances singularly futile, declaration that:

"it is an essential principle of the law of nations that no power can free itself from the engagements of a treaty, nor modify its terms except with the assent of the contracting parties by means of a friendly understanding."

But what if this friendly understanding cannot be reached? Surely the moral of such incidents is that it is no more possible for modern international law to insist on the perpetual and absolute binding force of treaties, than it has been for English law to adhere to Sir George Jessel's well-known doctrine of the sanctity of contract in *Printing Co.* v. *Sampson.*[1] That doctrine has been qualified by innumerable legislative interferences, and by an enormous judicial development of the law relating to impossibility of performance, restraint of trade, public policy and the like; and yet there is no reason to think that the respect for good faith among Englishmen has been sensibly weakened in the process. Nor need the good faith of nations be weakened by a similar development of international law. Indeed without some such development the prospects of good faith in international law are far less hopeful than they would have been in municipal law; for municipal law at least was not handicapped by the necessity of upholding the sanctity of a contract into which one party has been induced to enter by duress.

The fundamental fact which seems to lie at the root of the divorce between law and policy in international relations is that the law remains formally based on an individualistic theory of the relations of States which the States themselves have to a very great extent discarded. Law is still thinking in terms of rights; States are thinking of interests and demanding that they be protected, "si possis recte, si non, quocumque modo." A system of law that encourages the maximum assertion of will may be tolerable at certain times, as in the nineteenth century; but we are more and more finding it intolerable in the twentieth, and it has already almost ceased to be the theory, as it certainly has ceased to be the practice, of our municipal law. Yet we continue to proclaim it as the unchallengeable basis of international law, though it is rapidly passing away also from the structure of international society. To do that means that we are consenting to a divorce between the law and the ideas of justice prevailing in the society for which the law exists; and it is certain that as long as that divorce endures, it is the law which will be discredited.

[1] L. R. 19 Eq. 465.

THE LEGALITY OF THE OCCUPATION OF THE RUHR

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THE following remarks consist of an attempt to state the issues of international law which are raised by the present occupation by France of the territory lying east of the Rhine usually known as the Ruhr Valley. The legal and political issues are inevitably somewhat interconnected, and I have done my best to disentangle them and confine myself to the former. It is perhaps right to add that I have not had access to any documents other than those which have been published.

When one State is found in occupation of the territory of another, there are various ways in which the occupation may have come about and grounds on which it may be justified; for instance, as an incident to warfare, or as a measure of reprisals not intended to amount to war, or under a lease or a pledge, or in pursuance of a treaty stipulation authorizing the occupation as a guarantee for the fulfilment of the treaty. We are concerned with the last.

The French Government definitely rely [1] upon Annex II to Part VIII (Reparation) of the Treaty of Versailles and in particular upon paragraphs 17 and 18 which read as follows. Both the French and English texts are made authentic by the Treaty, but it is desirable to quote them both—particularly as in this instance they reveal a slight discrepancy.

17. In case of default by Germany in the performance of any obligation under this Part of the present Treaty, the Commission will forthwith give notice of such default to each of the interested Powers and may make such recommendations as to the action to be

17. En cas de manquement par l'Allemagne à l'exécution qui lui incombe de l'une quelconque des obligations visées à la présente Partie du présent Traité, la Commission signalera immédiatement cette inexécution à chacune des Puissances

[1] For the very good reason that "Germany agrees not to regard as acts of war" measures falling within paragraph 18.

taken in consequence of such default as it may think necessary.

18. The measures which the Allied and Associated Powers shall have the right to take, in case of voluntary default by Germany, and which Germany agrees not to regard as acts of war, may include economic and financial prohibitions and reprisals and in general such other measures as the respective Governments may determine to be necessary in the circumstances.

intéressées en y joignant toutes propositions qui lui paraîtront opportunes au sujet des mesures à prendre en raison de cette inexécution.

18. Les mesures que les Puissances alliées et associées auront le droit de prendre en cas de manquement volontaire par l'Allemagne, et que l'Allemagne s'engage à ne pas considérer comme des actes d'hostilité, peuvent comprendre des actes de prohibitions et de représailles économiques et financières[1] et, en général, telles autres mesures que les Gouvernements respectifs pourront estimer nécessitées par les circonstances.

Accordingly, in the note which the French and Belgian Governments dispatched to the German Government dated January 10, 1923,[2] the occupation of the Ruhr Valley was specifically based upon certain defaults in the delivery of timber and coal to France, which we are about to discuss, and upon paragraphs 17 and 18 of Annex II quoted above. On January 11, 1923, French and Belgian troops proceeded to occupy the Ruhr Valley, with the moral support of Italy, evidenced by the participation of a body of Italian engineers.

I propose to examine the meaning of paragraphs 17 and 18 under the following headings :

I. The provisions for the interpretation of the Treaty.
II. " The interested Powers."
III. " The respective Governments."
IV. The taking of the measures.
V. " And in general such other measures."
  (*a*) The *ejusdem generis* rule.
  (*b*) The construction of the Treaty as a whole.
VI. The argument based on Estoppel.
VII. Summary of conclusions.

[1] Mr. David Hunter Miller, one of the legal advisers of the American Peace Commission, has pointed out that the word *financières* was inserted on the motion of M. Klotz, and qualifies the word *représailles*. (*New York Evening Post*, August 21, 1923.)

[2] *The Times*, January 11, 1923.

I.—The Provisions for the Interpretation of the Treaty.

Article 233 of the Treaty clothes the Reparation Commission with certain powers contained in Annexes II to VII for the enforcement of the reparation clauses. Paragraph 12 of Annex II contains the following relevant passage :

" The Commission shall have all the powers conferred upon it, and shall exercise all the functions assigned to it, by the present Treaty

The Commission shall in general have wide latitude as to its control and handling of the whole reparation problem as dealt with in this Part of the present Treaty *and shall have authority to interpret its provisions.*" [1]

Paragraph 13 of Annex II prescribes the method by which the Commission is to arrive at its decisions and states that " unanimity is necessary " on certain questions, including " (f) Questions of the interpretation of the provisions of this Part of the present Treaty." [2] The paragraph continues as follows :

" All other questions shall be decided by the vote of a majority.

In case of any difference of opinion among the Delegates, which cannot be solved by reference to their Governments, upon the question whether a given case is one which requires a unanimous vote for its decision or not, such difference shall be referred to the immediate arbitration of some impartial person to be agreed upon by their Governments, whose award the Allied and Associated Governments agree to accept."

A formal interpretation of paragraph 17 was made by the Reparation Commission at their meeting on December 26, 1922, to the following effect : [3]

" The Reparation Commission in the exercise of its powers of interpretation under paragraph 12 of Annex II, Part VIII, of the Treaty of Versailles, decided that the word ' default ' in paragraph 17 of the said Annex had the same meaning as the expression ' voluntary default ' in paragraph 18 of the same Annex."

[1] Italics mine.

[2] It should be noted (*Report on the Work of the Reparation Commission from 1920 to 1922*, published by H.M. Stationery Office in 1923, p. 13) that an arbitration clause was subsequently added which reads as follows :

" 13 *bis*. In case of differences of opinion between the Delegates on the interpretation of the stipulations of this part of the present Treaty, the question will be submitted by the unanimous agreement of the Delegates to arbitration. The Arbitrator will be selected unanimously by all the Delegates or in default of unanimity will be nominated by the Council of the League of Nations. The finding of the Arbitrator will be binding on all the interested parties." So far as I can ascertain, France has declined to sign the necessary protocol embodying this amendment, so that the statement in the *Report on the Work of the Reparation Commission* referred to above that the terms of the Treaty have been modified is incorrect if my information is correct.

[3] *Report on the Work of the Reparation Commission*, p. 263.

Upon this interpretation the delegates to the Commission as then constituted were unanimous, as was necessary to make the interpretation effective.

Before we discuss the merits of the controversies that have arisen upon the meaning of paragraphs 17 and 18, namely what is meant by "interested Powers" in 17, "respective Governments" and "such other measures" in 18, two preliminary objections arise, resting upon the requirement of unanimity in the "interpretation of the provisions of this Part of the present Treaty." Not until we have disposed of these objections can we pass to the substance of those paragraphs.

The first objection arises on clauses 53 to 57 of the minutes of the meeting of the Reparation Commission on December 26, 1922,[1] which read as follows :

53. (1) *The Commission notes that Germany has not executed in their entirety the orders passed under Annex IV, Part VIII, of the Treaty of Versailles, for deliveries of timber to France during 1922.*

54. Sir John Bradbury, M. Louis Barthou, Signor d'Amelio, and M. Delacroix voted in favour of this proposal, *which was in consequence adopted unanimously.*

55. The Chairman then put to vote the second proposal :

56. (2) *This non-execution constitutes a default by Germany in her obligations within the meaning of Paragraph 17 of Annex II.*

57. M. Louis Barthou, Signor d'Amelio, and M. Delacroix voted for this proposal. Sir John Bradbury voted against. *The proposal was thus adopted by a majority.*

It will be noted that on the pure question of fact put in clause 53 the delegates were unanimous, but that upon the question of interpretation in clause 56, namely, whether this fact constitutes a "default" within the meaning of paragraph 17 of the Treaty or not, the delegates were not unanimous.

I must confess to a little surprise that Sir John Bradbury did not at once claim that clause 56 of the minutes raised a question of interpretation on which unanimity is essential. He does not appear from the minutes to have taken this line, and doubtless had good reasons for not doing so.[2] I should be sorry to be

[1] *Ibid.*, p. 260. The italics are not mine.

[2] Interpretation = "the action of interpreting or explaining" or "the way in which a thing ought to be interpreted : proper explanation : hence, signification, meaning." (*The New English (Oxford) Dictionary*). See Wharton's *International Law Digest*, § 133, II, 36. "'Construction' is to be distinguished from 'interpretation.' 'Construction' gives the general sense of a treaty and is applied by rules of logic ; 'interpretation' gives the meaning of particular terms to be explained by local circumstances and by the idioms the framers of the treaty had in mind." (Cited Moore : *Digest of International Law*, § 763.)

thought to raise the point in any critical spirit, for his masterly handling of an exceedingly difficult and delicate situation compels admiration.

The second preliminary point was raised by Sir John Bradbury by way of anticipation earlier in the course of the same meeting. From paragraph 38 of the same minutes[1] it appears that he claimed that—

" The interpretation of paragraph 18 [of Annex II] depended on the Commission which had received a mandate by the contract of the Allied Powers with Germany to interpret the portion of the Treaty in which it figured. Very grave difficulties had arisen in connexion with the interpretation of this paragraph, and certain Powers had maintained that the words ' and in general such other measures which the respective Governments may determine to be necessary in the circumstances,' were to be read absolutely at large as enabling any Allied Power, notwithstanding the definite provisions in other portions of the Treaty limiting the extent of the territories to be occupied, to extend the area of military occupation. This was a question of vital importance for the peace of Europe, which could only be decided by a unanimous decision of the Commission. The Commission ought not to allow the question to escape out of its control until it had definitely laid down, as it alone could, the definite and authoritative interpretation of that paragraph."

The Chairman, M. Louis Barthou, indicated (paragraph 43)—

" that his opinion as to the interpretation of paragraph 18 differed from that of Sir John Bradbury ; he considered that this interpretation was not within the competence of the Commission." [2]

There the matter appears to rest, and, so far as I can ascertain, the Commission has never proceeded to an interpretation on this point.

II.—" The Interested Powers."

Turning to paragraph 17 of the Treaty, who are the " interested Powers ? " This question is answered for us in the case of the timber default by clause 78 of the minutes of the meeting of the Commission on December 26, 1922 :

78. " *It was decided on the present occasion to understand by the phrase ' interested Powers ' in paragraph 17 of Annex II, Great Britain, France, Italy and Belgium. A copy of the letter addressed to these four Governments would be despatched to the Government of the United States of America.*" [3]

[1] *Report on the Work of the Reparation Commission*, p. 257.

[2] It will be noted that M. Barthou differed from Sir John Bradbury not on the question whether the matter was one of interpretation or not, but on the question of the proper authority invested with the power to interpret.

[3] *Ibid.*, p. 263. Italics not mine.

Notice, however, from clause 53 of the minutes already quoted, that the default recorded was in deliveries of timber *to France*. So "interested Powers" means something more than beneficiary or recipient Powers.

The coal default was recorded by the Reparation Commission on January 9, 1923, and is believed to have been similarly notified to the same four Powers. And on January 16, 1923, when Germany suspended reparation deliveries to France and Belgium, notice of these defaults was given to the same four Powers.

III.—"The Respective Governments."

Coming to paragraph 18, we find that the right of taking action upon a voluntary default is vested in "the Allied and Associated Powers." They have the "right to take" measures which "may include economic and financial prohibitions and reprisals." If those measures do not suffice, it is then for "the respective Governments" to determine what other "measures" are "necessary," whereupon "the Allied and Associated Powers" have the "right to take" them.

Is it possible to extract a meaning from this loosely drawn paragraph? We can, I think, safely say that the military occupation of the Ruhr does not fall within the scope of the expression "economic and financial prohibitions and reprisals," and the French text makes it clearer that the reprisals contemplated are not all the kinds of reprisals recognized by international law but only those which are economic and financial — "*des actes de prohibitions et de représailles économiques et financières.*" Nor does M. Poincaré contend that his operations fall within that expression: in his speeches on January 12, 1923, in the Chamber and the Senate he relied upon the words "telles autres mesures que" as being "aussi générale, aussi compréhensive, aussi large que possible."[1] We are justified therefore in turning to an examination of the term "the respective Governments." "Respective" is a word which requires careful handling, as English draftsmen know, and a word which the inexperienced draftsman is apt to scatter about as it were with a pepper pot. According to the *Concise Oxford Dictionary* it means *each's own, proper to each, individual, several, comparative,*

[1] Cited in *Right and Wrong in the Ruhr Valley* (British Periodicals Limited, 1923), p. 14.

e. g. go to your respective places. It is used in conjunction with a plural noun to indicate a reference to or connexion with some other plural noun, and moreover to indicate that the connexion is not higgledy-piggledy, promiscuous, but involves an exact correspondence. For instance, the members of a football team when they enter the field take their respective places. What then is the plural noun to which the term " the respective Governments " refers ? Whose are " the respective Governments " ? Two possible claimants must be considered : (i) " the Allied and Associated Powers " in paragraph 18 ; and (ii) " the interested Powers " in paragraph 17. I think (i) is unlikely for the following reasons : (*a*) because such an interpretation would involve the concurrence of twenty-six Governments before anything could be done ; (*b*) because at least three of the signatory Powers had suffered no damage in " respect of which reparation was due from Germany " ; [1] (*c*) because, if " the respective Governments " means the Governments of the Allied and Associated Powers, the word " respective " seems devoid of meaning. Why not simply say " their Governments " or " the Governments of the Allied and Associated Powers " ? If " the respective Governments " referred to be those of all the Powers, it is surprising not to find the word " their " used.

If, however (which I do not think is the case) interpretation (i) is right, then I think it is clear from the Treaty that that group is throughout it regarded as the united group of parties with whom Germany has contracted, and that joint and not individual action is contemplated. Moreover for purposes of action the group have delegated their authority to a smaller and more efficient instrument which is in the matter of reparation the Reparation Commission.[2] Paragraph 12 of Annex II reads as follows :

" The Commission shall have all the powers conferred upon it, and shall exercise all the functions assigned to it, by the present Treaty.

The Commission shall in general have wide latitude as to its control and handling of the whole reparation problem as dealt with in this Part of the

[1] Bolivia, Haiti and Peru (*Report on the Work of the Reparation Commission*, p. 43).

[2] The following passage occurs in the memorandum enclosed in the reply (dated June 16, 1919) of the Allied and Associated Powers to the observations of the German Delegation on the conditions of peace :

" In short the observations of the German Delegation present a view of this [the Reparation] Commission so distorted and so inexact that it is difficult to believe that the clauses of the Treaty have been calmly or carefully examined. It is not an engine

present Treaty and shall have authority to interpret its provisions. Subject to the provisions of the present Treaty, the Commission is constituted by the several Allied and Associated Governments referred to in paragraphs 2 and 3 above as the exclusive agency of the said Governments respectively for receiving, selling, holding, and distributing the reparation payments to be made by Germany under this Part of the present Treaty."

If on the other hand interpretation (ii) is accepted, namely that " the respective Governments " are the Governments of " the interested Powers " referred to in paragraph 17, these difficulties seem to me to disappear, and the word " respective " receives a meaning. From clause 78 of the minutes of the meeting of the Reparation Commission on December 26, 1922, we learn that " the interested Powers " for the purpose of the timber default are Great Britain, France, Italy and Belgium, and for the purpose of the coal default " the interested Powers " are the same. It was therefore for the Governments of these four Powers to determine what " other measures " should be taken against Germany; and, there being no provision making a majority vote effective, it was necessary for all four to concur in the determination, which did not in fact take place, for the British Government dissented from the measures proposed.

IV.—The Taking of the Measures.

Even supposing that " the respective Governments " of the four Powers mentioned had concurred in the " other measures " to be taken against Germany, the fact remains that it is " the Allied and Associated Powers " who are to take these measures. It can hardly be expected that all the twenty-six are to take them, and the reasonable view is that they are to act through some common organ such as the Supreme Council or the Reparation Commission. The case of Roumania in 1919 is in point. That country in August 1919 set out to collect reparation from Hungary " on her own " by occupying Hungarian territory and removing Hungarian assets. Thereupon the Roumanian Government was reprimanded by the Supreme Council of the Allies in a note signed by M. Clemenceau as chairman of the Peace Con-

of oppression or a device for interfering with German sovereignty. It has no forces at its command; it has no executive powers within the territory of Germany. . . . Its business is to fix what is to be paid; to satisfy itself that Germany can pay; and to report to the Powers, whose Delegation it is, in case Germany makes default." (*Cmd.* 258, 1919, Misc. No. 4, p. 33.)

ference and dated August 23, 1919. By that note Roumania was told that it was—

" obvious that if the collection of reparation were to be allowed to degenerate into individual and competitive action by the several Allied and Associated Powers, injustice [would] be done and cupidity aroused, and, in the confusion of unco-ordinated action, the enemy [would] either evade or be incapacitated from making the maximum of reparation."

Accordingly Roumania was called upon to recognize—

" that the assets of enemy States are a common property of all the Allied and Associated Powers,"

and that the Reparation Commission is—

" the exclusive agency for the collection of enemy assets by way of Reparation." [1]

This incident has a negative value by indicating that the Treaties of Peace contemplate collective and not individual action in the recovery of reparation, though it does not throw any very definite light on the question what the common organ for that purpose should be.

V.—" And in general such other measures."

M. Poincaré, as we have seen, regards his operations in the Ruhr as coming within this expression. These are general words, and the construction of general words is notoriously a matter of difficulty and doubt, upon which an opinion can only be advanced with caution. The words in the same paragraph (18): " and which Germany agrees not to regard as acts of war," while indicating that drastic action is contemplated within that paragraph, cannot be construed as having any special reference to the military occupation of territory, for there are many reprisals and other methods of compulsion which without necessarily amounting to war may nevertheless be treated as acts of war by the State against whom they are directed.

(a) *The* ejusdem generis *Rule of Construction.*

Leaving on one side for the moment the question how far the rules of English jurisprudence can be imported into an international document, let us attempt to construe this clause as if it occurred in an English contract. Mr. Beal [2] states the rules

[1] See *Right and Wrong in the Ruhr Valley*, p. 30, where this incident is discussed.

[2] *Cardinal Rules of Legal Interpretation* (3rd ed., 1924, by A. E. Randall), p. 179.

governing the construction of " General and Special Words " as follows :

> " Doctrine of *Ejusdem Generis* or *Noscitur a sociis. Generalia verba sunt generaliter intelligenda.* 5 Inst. c. 21. *Verba generalia restringuntur ad habilitatem rei vel personae.*
>
> General words of a deed are *prima facie* to be taken in their usual sense.
>
> General words of a deed are to be restrained by the other parts of a deed, if the intent so to restrain them be apparent.
>
> General words in a deed following special words are *prima facie* to be taken in their general sense unless the reasonable interpretation of the deed requires them to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before.
>
> Where general words are followed by special words the special words limit the general words.
>
> If the particular words exhaust the whole *genus*, the general words refer to some larger *genus*."

It is argued by some that paragraph 18 is a case in which the *ejusdem generis* rule must be applied and that the result of applying it is to limit the general words under discussion—" in general such other measures "—to measures of the same class as " economic and financial prohibitions and reprisals." Let us examine this argument. There is no presumption in favour of the *ejusdem generis* rule.[1] It is not a canon of construction but merely an indication which may in certain cases be helpful. (Moreover, the use of the word " include " (*comprendre*) must not be overlooked.) Is there a *genus* ? I think so. International law already recognizes a number of so-called " pacific " measures for the enforcement of international obligations, for instance, reprisals, embargo (a species of the former), pacific blockade (sometimes also a species of reprisals, sometimes an act of intervention) ; Article 16 of the Covenant of the League has added to these the economic boycott, and it is obvious that other non-military methods of obtaining reparation can be devised, for instance the reparation levy under the German Reparation (Recovery) Act, 1921, or the impounding of the property of German nationals in allied territory which is provided for by Article 297 (b) of the Treaty. The dominant and co-ordinating idea which underlies all such measures and which indicates their *genus* seems to me to be that they are mainly non-military. They are economic, financial, commercial; they are for the most part put in force by the civil arm of the State, and do not, unless resisted,

[1] *Maghnild* (S.S.) v. *McIntyre Bros. and Co.* [1920] 3 K.B. at p. 327.

involve the employment of naval, military, or air forces. This is an important consideration, but the mere use of special words enumerating a number of things belonging to one genus, followed by general words, is not enough to attract the application of the *ejusdem generis* rule. One of the best discussions of the rule will be found in *Anderson* v. *Anderson* [1] (a case of a marriage settlement) where a settlor assigned to trustees " all and singular the household furniture, plate, linen, china, glass, and tenant's fixtures, wines, spirits and other consumable stores, and other goods, chattels and effects in, or upon, or belonging to " certain leasehold premises which comprised coach-houses and stables containing carriages, horses, harness and stable furniture. It was sought by the executors to exclude from the operation of the settlement the carriages, horses, &c., on the ground that as the result of the operation of the *ejusdem generis* rule the words " other goods, chattels and effects " were limited to things *ejusdem generis* with household furniture, plate, linen, &c. The Court of Appeal rejected this contention and held that the carriages, horses, &c., passed under the settlement. Lord Esher M.R. said :

" Nothing can well be plainer than that [referring to a previous citation from an earlier case] to shew that *prima facie* general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before. . . . I reject the supposed rule that general words are *prima facie* to be taken in a restricted sense."

Lopes L.J. pertinently remarked that " the doctrine of *ejusdem generis* is a very valuable servant, but it would be a most dangerous master." It is therefore very far from being certain that the *ejusdem generis* rule of construction would be applied to the words " and in general such other measures," even if we were at liberty to treat them as if they occurred in an English contract; and for the reasons indicated in a note printed on another page of this volume [2] I do not think that an international tribunal would feel itself bound to apply this rule.[3]

[1] [1895] 1 Q.B. 749.

[2] See note on p. 181.

[3] The very numerous cases on the *ejusdem generis* rule will be found collected and discussed in Stroud's *Judicial Dictionary, sub title* " Other." A recent illustration of the application of the rule will be found in *A. G.* v. *Brown* [1920] 1 K.B. 773 (a statute), and of a refusal to apply the rule in *Maghnild* (S.S.) v. *McIntyre Brothers and Co.* [1920] 3 K.B. 321 ; [1921] 2 K.B. 97 (a charter party).

(b) *The Construction of the Treaty as a Whole.*

I have discussed the *ejusdem generis* rule at some length because so many persons who have taken the trouble to look at paragraph 18 of Annex II have too readily assumed that the *ejusdem generis* rule applies and that that concludes the legal argument against the French action and view. I do not think it does conclude the matter, but I am about to submit that a wider examination of the provisions of the Treaty inspired by a desire to give effect to the Treaty as a whole will drive us to the same conclusion, namely, that the words " and in general such other measures, &c." are intended to have a restricted meaning.

There is one general rule for the construction of documents which seems to me to be so much the embodiment of the common sense and experience of mankind as to justify its application to an international document. Put very shortly, it is that a document must be construed *as a whole*. In the civil law the rule occurs as follows : *incivile est nisi tota lege perspecta una aliqua particula ejus proposita judicare vel respondere.*[1] Vattel [2] citing this rule renders it as follows :

Il faut considérer le discours tout entier, pour en bien saisir le sens, et donner à chaque expression, non point tant la signification qu'elle pourrait recevoir en elle même, que celle qu'elle doit avoir par la contexture et l'esprit du discours.

Or, to give it a more modern form, in the words of an American Secretary of State in a diplomatic note :

" There is no rule of construction better settled either in relation to covenants between individuals or treaties between nations than that the whole instrument containing the stipulations is to be taken together, and that all articles *in pari materia* should be considered as parts of the same stipulations." [3]

Applying this rule to the Treaty of Versailles, surely it cannot be denied that Part VIII dealing with Reparation and Part XIV dealing with Guarantees are *in pari materia*. Part XIV (Articles 428–32) contains the provisions for the Allied occupation or reoccupation of German territory.

Article 428 provides as follows :

" As a guarantee for the execution of the present Treaty by Germany, the German territory situated to the west of the Rhine, together with the bridge-heads, will be occupied by Allied and Associated troops for a period of fifteen years from the coming into force of the present Treaty."

[1] *Digest*, I, 3, 24.

[2] Liv. II, Chap. XVII, § 285. See also Phillimore : *International Law*, Vol. II, Ch. VIII, § lxx.

[3] Moore : *Digest of International Law*, § 763.

Article 429 successively restricts the occupation stipulated in Article 428 by providing for partial evacuations after five and ten years respectively " if the conditions of the present Treaty are faithfully carried out by Germany."

Article 430 provides as follows :

" In case either during the occupation or after the expiration of the fifteen years referred to above the Reparation Commission finds that Germany refuses to observe the whole or part of her obligations under the present Treaty with regard to reparation, the whole or part of the areas specified in Article 429 will be re-occupied immediately by the Allied and Associated forces."

I read the meaning of these clauses in relation to reparation as follows : if Germany makes default in the matter of reparation, then, in addition to the non-military powers conferred upon the Reparation Commission by Part VIII of the Treaty, the Allied Powers may exploit their position as occupants of the territory " west of the Rhine together with the bridgeheads " referred to in Article 428, and further may reoccupy under Article 430 any part of that territory which may have been evacuated under Article 429. The reference in Article 430 to Article 429 seems to me to limit the area of German territory which can for purposes of obtaining reparation be occupied or reoccupied under the Treaty. It is only German territory situated to the west of the Rhine together with the bridgeheads which can be occupied or reoccupied *under the Treaty*, and it is under the Treaty that France claims to be acting. (The Ruhr Valley lies, of course, to the east of the Rhine.) Whether quite apart from the Treaty there is án unlimited right of occupation of the territory of a defaulting party, or whether on the principle *expressum facit cessare tacitum* Part XIV exhausts the rights of occupation of territory for default, are questions we need not consider here, for France bases her occupation of the Ruhr on the Treaty. It should, however, be noted that the letter which the Allied Powers addressed to the President of the German Delegation at the time of the signature contains the following sentence : " Il est bien entendu qu'en dehors des sanctions du traité subsistent toutes les sanctions du droit des gens, du droit commun, et que nous pourrons y recourir." [1]

[1] Fauchille : *Droit International Public*, Tome II (*Guerre et Neutralité*), § 1709[4] M. Fauchille, *loc. cit.*, while asserting that paragraph 18 of Annex II " autorise les puissances alliées en cas d'inexécution par l'Allemagne de ses obligations, à edicter, de la manière la plus large et sans aucune espèce de restrictions, des actes de

The conclusion, therefore, to which I find myself driven is that under the Treaty recourse to occupation as a means of enforcing a default in reparation is limited to the existing occupation or, in so far as it may be evacuated, the future re-occupation, of the territory specified in Article 428 above quoted. It is argued by Mr. George A. Finch [1] that Part XIV cannot bear this restricted interpretation and that the words " such other measures as the respective governments may determine to be necessary in the circumstances " must be extensively construed, because any other construction leads to the practical futility of the Treaty ; and he refers to Vattel [2] as quoted by an American Secretary of State to the effect that—

" the interpretation which would render a treaty null and inefficient cannot be admitted ; that it ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory."

Phillimore [3] (citing Digest XLV. i. 80 *Quoties in stipulationibus ambigua oratio est, commodissimum est id accipi, quo res, qua de agitur, in tuto sit*) expresses the rule thus :

" When a provision or clause in a Treaty is capable of two significations, it should be understood in that one which will allow it to operate, rather than in that which will deny to it effect."

prohibitions et de représailles économiques et financières et, en général, telles autres mesures que les gouvernements respectifs pourront estimer nécessitées par les circonstances " proceeds to argue that if the military occupation provided for by Articles 429 and 430 is not effective to secure the execution of the treaty, the common law rules of international law must be applied, and that these rules justify resort to any measures necessary to overcome the resistance of the recalcitrant party, one of such measures being the occupation of its territory. He cites amongst other authorities Vattel, *Droit des Gens*, Liv. II, Ch. XVIII, § 342 ; Grotius, *De Jure Belli ac Pacis*, III, Cap. II, § IV ; Bluntschli, *Droit International Codifié*, art. 500 ; and Oppenheim, *International Law*, I, § 156, and II, § 34. Herein it seems to me that M. Fauchille's case differs radically from the official French argument which seeks to justify the occupation within paragraph 18 of Annex II, presumably in order to get the benefit of Germany's undertaking in that paragraph not to regard measures taken within it as acts of war. It cannot be denied that reprisals are available for non-compliance with treaty obligations (Oppenheim, *op. cit.*, II, § 34), but that is not the same thing as saying that when a body of Allied States have agreed amongst themselves and with their enemy upon certain machinery for the joint enforcement by them of a treaty, any one, two, or three of those Allies can, while keeping the treaty in existence, embark upon measures for its enforcement which, though recognized by international law as measures of self-help, are not contemplated by the treaty. (Reference may also be made to a note by the late M. Edouard Clunet in *Journal du droit international*, Vol. 49, p. 333).

[1] *American Journal of International Law*, October, 1923, p. 728.

[2] Liv. II, Ch. XVII, § 283.

[3] *Op. cit.*, Vol. II, Ch. VIII, § lxxiii. See also Oppenheim ; *International Law* Vol. I, § 554 (12)

But, unless I misinterpret Mr. Finch, this part of his argument amounts to this : one undoubted object of the Treaty was to get reparation from Germany ; the occupation of the Rhineland under Part XIV has not in fact produced the amount of reparation required by the Treaty—

" therefore, an interpretation of Part XIV which would restrict the liberty of action under the clause ' such other measures as the respective Governments may determine to be necessary in the circumstances ' in paragraph 18 of the reparation clauses so as to impede the collection of the amount of reparations due under the treaty, would do violence to the plain intentions of the contracting parties and would seem to be inadmissible." [1]

This argument appears to me to rest on the assumption (not admitted and not being demonstrated by the result) that the present French action in the Ruhr is the best way to get reparation.[2]

VI.—The Argument based on Estoppel.

If the matter rested there, I should have little hesitation in submitting the opinion not merely that Germany is right in her contention that the French measures are illegal under the Treaty but further that Great Britain is justified in subscribing to the German contention as she does in the Note to France of August 11, 1923. But the case is not quite one of first impression. The slate is not clean. Another issue is raised. It is argued by the French Government that, whatever may be the true interpretation of paragraph 18 of Annex II, Great Britain at any rate is precluded from advancing her present interpretation by reason of her concurrence in the French interpretation, both by her declarations and by her active participations in occupations and threats of occupation of German territory in the past. This argument makes it necessary for us to consider : (i) the circumstances alleged to raise an estoppel ; (ii) the nature of estoppel and its scope in international law ; (iii) the conclusions to be drawn from (i) and (ii) as being relevant to our present case.

(i) In the interests of brevity I shall summarize the various earlier incidents which, it is argued, throw light upon the interpretation of paragraph 18.

[1] *loc. cit.*

[2] See also Phillimore's warning (*op. cit.*, § lxx) as to the need of sparing and cautious recourse to " the rule of having regard to the consequences, to the justice or injustice, advantage or disadvantage, which would ensue from affixing a particular meaning to the doubtful expressions."

(*a*) Early in April, 1920,[1] France acting alone occupied Frankfort, Darmstadt, Homburg, and Hanau, on the ground that Germany in the course of suppressing Communist disturbances in Westphalia and the Ruhr had sent into those areas more troops than was permitted by the Treaty.

(*b*) In July, 1920, the Principal Allied Powers secured Germany's acceptance of the Spa Agreement by jointly threatening to invade Germany. That agreement related to reparation.

(*c*) In October, 1920, Great Britain notified her Allies that she had renounced the right to seize the property of German nationals in this country in the event of default by Germany in respect of her reparation obligations, and the Chancellor of the Exchequer stated in the House of Commons (October 28, 1920) [2] that "the words of the paragraph [18] clearly leave it 'to the respective Governments' to determine what action may be necessary under the paragraph." The ground of the decision he stated to be that the effect of this threat of seizure was "to keep business away from London and to make Germans keep their balances in neutral currencies." [3] With respect, I cannot accept this interpretation of paragraph 18. If Great Britain were the only Power interested in the seizure and the liquidation of the property of German nationals, then it might be argued that she could renounce her right. *Quilibet renunciare potest juri pro se introducto.* "L'état qui a obtenu des droits en vertu d'un traité, peut toujours y renoncer." [4] But, as I read the Treaty, the proceeds of the liquidation of such property would have to be brought into the general reparation account.

(*d*) In March, 1921, the Allies (Belgium, France and Great Britain) occupied Duisburg, Düsseldorf, and Ruhrort (all east of the Rhine) in spite of the protest of the German Government on the ground of the illegality of the threatened occupation. In handing to the German Government the ultimatum of March 3, 1921, the Allied Powers charged Germany with default in three respects, the delivery of war criminals for trial, disarmament, and non-payment of instalments of reparation.[5]

(*e*) In May, 1921, the principal Allied Powers delivered to

[1] See *The Times* of April 7, 1920, and following days.

[2] *Parliamentary Debates*, House of Commons, Vol. CXXXIII, c. 1922.

[3] Belgium and Italy took similar steps in 1921 (See Fauchille : *op. cit.*, § 1708 and *Le Temps* of February 10, 1921).

[4] Bluntschli : *Droit International* (Lardy's translation), § 453.

[5] Keynes : *A Revision of the Treaty*, p. 198.

Germany an ultimatum threatening to occupy the Ruhr Valley unless she accepted the Allied demands in respect of instalments of reparation, disarmament, and the trial of war criminals.

(*f*) In answer to a question in the House of Commons on May 24, 1922, as to the meaning of paragraph 18 of Annex II the Chancellor of the Exchequer stated [1] in the course of his reply that :

" paragraph 18 is understood by His Majesty's Government as conferring upon the individual Governments the right to take action independently, but the action taken must be of the nature contemplated by the paragraph, namely, economic and financial prohibitions and reprisals, and in general such measures as it is proper for Governments to take individually."

With respect, I cannot accept this interpretation of paragraph 18 for the reasons indicated earlier. He added that :

" by paragraph 12 of the same Annex the right to interpret the provisions of the Reparation Section of the Treaty is conferred upon the Reparation Commission, and that the views of His Majesty's Government on the subject have therefore no binding character."

It will be noticed that the grounds of these various occupations and threats of occupation differed, and only the threat which secured the German acceptance of the Spa Agreement can be said to relate solely to reparation. My own view is that though some of the occupations and threats of occupation might have been justified *dehors* the Treaty, for Germany was undoubtedly a defaulter in many respects, they cannot be justified within it. Oppenheim,[2] drawing a distinction between a violation of a peace treaty " during the period in which the conditions of the peace treaty have to be fulfilled, and a violation afterwards," states that : " in the first case, the other party may at once recommence hostilities, the war being considered not to have terminated through the violated peace treaty." But it is of the essence of the French case that France is acting within the Treaty and applying measures " which Germany agrees not to regard as acts of war." The Allies have not cancelled the Treaty of Versailles on the ground of Germany's violations of its provisions, and, so long as they maintain the Treaty by claiming to act under it, it seems to me that they are bound by its terms. To use a legal expression they cannot both " approbate and reprobate."

[1] *Parliamentary Debates*, House of Commons, Vol. CLIV, c. 1246 cited in *Right and Wrong in the Ruhr Valley*, p. 16.

[2] *Op. cit.*, Vol. II, § 278.

(ii) Estoppel has been defined as "not a cause of action" but "a rule of evidence which precludes a person from denying the truth of some statement previously made by himself;" [1] and the English lawyer is accustomed to regard it as arising (*a*) from a judgment, (*b*) from matter in a deed, i. e. a writing under seal, or (*c*) from conduct. We are not concerned with (*a*) and (*b*). The *locus classicus* for estoppel by conduct is *Pickard* v. *Sears*,[2] where Lord Denman C.J. stated the rule thus :

"Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

It is also well put as follows :

"A man cannot at the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he would only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage." [3]

Further it is essential that the party setting up the estoppel should prove prejudice, that is, that he acted or abstained from action upon it to his detriment. As James L.J. put it in *Ex P. Adamson* : [4]

"Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something or to abstain from doing something by reason of what he had said or done, or omitted to say or do."

The doctrine of estoppel does not appear to have received much attention in the sphere of international law. That branch of it which is known as *res judicata* receives recognition in the

[1] Per Lindley L.J. in *Low* v. *Bouverie* [1891] 3 Ch. at p. 101.

[2] (1837) 6 A. & E. at p. 474.

[3] Per Honyman J. in *Smith* v. *Baker* (1873) L.R. 8 C.P. at p. 357.

[4] 8 Ch. D. 817. See also the statement by Lord Campbell L.C. in *Cairncross* v. *Lorimer*, 3 Macq. 827 : "The doctrine . . . is to be found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they might otherwise have abstained, he cannot question the legality of the act he has so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct." (I have not been able to find a case of an estoppel arising from concurrence in an erroneous interpretation of words in a document, and am doubtful whether it would arise in such a case.)

Pious Fund Arbitration,[1] and two authorities may be mentioned which throw some light upon the position of estoppel by conduct in this field. In the *Fur Seal Arbitration* [2] it was demonstrated that some advantage is to be gained by one State, party to a dispute, by convicting the other State of inconsistency with an attitude previously adopted. In that case the United States, having succeeded by cession in 1867 to all the rights of Russia in the Behring Sea, strenuously urged that Great Britain had recognized and conceded in and after 1821 Russia's claim to exclusive jurisdiction over the seal fisheries outside territorial waters, and the arbitrators considered the point of sufficient importance to make an express finding of fact to the contrary. On the other hand, Great Britain was at pains to point out that both she *and the United States* had emphatically protested against the Russian ukase of 1821 advancing these territorial claims. This is not estoppel *eo nomine*, but it shows that international jurisprudence has a place for some recognition of the principle that a State cannot blow hot and cold—*allegans contraria non audiendus est*. In a recent award by Honourable Chief Justice Taft in an arbitration between Great Britain and Costa Rica the doctrine of estoppel by conduct is recognized by implication though not applied in the circumstances of the case, and we find the statement that:

> "An equitable estoppel to prove the truth must rest on previous conduct of the person to be estopped, which has led the person claiming the estoppel into a position in which the truth will injure him." [3]

(iii) It is not easy in the dearth of authority in international law upon the nature and effect of estoppel to say how far the hands of Great Britain are tied by her conduct since 1920 in some of the incidents recorded above, albeit the issue of reparation has only once been so clear cut as on the present occasion and then no actual occupation took place. Nor do I think that too much weight can be attributed to the Roumanian incident referred to earlier [4] which did not arise upon the Treaty of Versailles and which bears the stamp not merely of isolated action in collecting reparation but also of an intention of isolated enjoyment of such reparation as might be collected. I have quoted elsewhere [5] Hall's warning against introducing "the refine-

[1] Moore: *International Arbitrations*, pp. 1349 *et seq.* [2] *Ibid.*, pp. 755 *et seq.*
[3] Printed in *American Journal of International Law*, January, 1924, p. 157.
[4] p. 24. [5] See Note on p. 182.

ments of the courts " into " the rough jurisprudence of nations." With that warning in mind, the broad view seems to be that Great Britain has been guilty of inconsistency upon the question of the legality of the occupation of Germany east of the Rhine, even in one case on a pure question of reparation, and also upon the interpretation of paragraph 18 ; and that an international tribunal could hardly fail to be unfavourably impressed by those inconsistencies in the event of a direct juridical issue being raised between Great Britain and France.

But there are in addition to France and Great Britain twenty-five other parties to the Treaty of Versailles. For many of them that contact with European politics was purely temporary, and no concurrence in the execution of the Treaty was to be expected from them. I do not overlook the fact that Italy and Belgium concurred in the French occupation of the Ruhr in January, 1923, and that the Principal Allied Powers were parties to some of the other occupations and threats of occupations, but the only other one of the signatories whose position will be examined here is Germany. Granted that a signatory of a Treaty which is accepted under coercion and after protest is bound by it, for herein international law does not recognize the necessity of full and free consent so vital to the ordinary municipal contract, I cannot see how the views of Great Britain and other States as to the interpretation of the Treaty can affect the rights of Germany, more particularly when the latter protested against occupations of territory carried out in pursuance of that interpretation.

In the sphere of English municipal law, whatever may be the effect of an estoppel as between the party against whom and the party by whom it is set up, it is a well recognized rule that " estoppel binds parties and privies, but not strangers." And this is merely a particular and local application of a general principle to the effect that, apart from agency, *pacta tertiis nec nocent nec prosunt*,[1] or *res inter alios acta alteri nocere non debet*, and that admissions only bind the party making them. On that point it seems to me that Germany has the law on her side, namely that as between her and France (the parties principally concerned) the legality or illegality of the occupation of the Ruhr must be judged without reference to the interpretations

[1] For the application of this principle in international law, see Roxburgh : *International Conventions and Third States.*

which other signatories may have given to the Treaty. And it will be noted that the line adopted by the British Note [1] to France of August 11, 1923, is that " the highest legal authorities in Great Britain have advised His Majesty's Government that the contention *of the German Government* is well founded."

I have not attempted to deal with the legality of the ordinances of the Rhineland Commission issued during and for the purposes of the occupation of the Ruhr Valley.

VII.—Summary of Conclusions.

I venture to sum up my conclusions as follows, and in so difficult a matter I do not want brevity of statement to be mistaken for a desire to be dogmatic.

(i) Annex II to Part VIII (Reparation) constitutes the Reparation Commission as the authority charged with the duty of interpreting Part VIII of the Treaty, and requires unanimity in giving interpretations—referring to arbitration any disputes on " the question whether a given case is one which requires a unanimous vote for its decision or not."

(ii) " The interested Powers " in paragraph 17 are Great Britain, France, Italy and Belgium.

(iii) " The respective Governments " in paragraph 18 whose duty it is to " determine . . . such other measures " are the Governments of " the interested Powers."

(iv) The measures once determined, it is for the Allied Powers acting through some common organ such as the Reparation Commission or the Supreme Council to " take " them.

(v) The expression "and in general such other measures," read in the light of the necessity of construing the Treaty as a whole and particularly in view of Part XIV (Guarantees), excludes military occupation of territory east of the Rhine and the bridgeheads.

(vi) Great Britain has by her previous declarations and conduct seriously prejudiced her right to complain as between herself and France of the illegality of the present occupation of the Ruhr Valley under the Treaty.

(vii) Germany on the other hand labours under no such point of prejudice, and her contention that this occupation is not a sanction permitted by the Treaty is well founded.

[1] *Cmd.* 1943.

THE CODIFICATION OF INTERNATIONAL LAW

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I

JEREMY BENTHAM first proposed the codification of international law.[1] The conception of his fertile, logical, but not wholly practical mind, was not that of a code of the existing law of nations, but of a new Utopian code which would create a legal foundation for eternal peace. His idea was revived in a less ambitious form in the second half of the nineteenth century. Proposals were made by a number of writers for the preparation of a great Digest of International Law, for a body of rules, based on the existing practice of States, which should govern all the relations between civilized States. The strength of the movement was due partly, no doubt, to the success of the great new codes of municipal law, which had been drawn up in the nineteenth century in various countries in Europe; partly to the defects of the existing system of international law which, by its nature, was confused and incomplete. That system was not, in Westlake's words, "the work of any legislator, but has arisen by the gradual clearing up of a confusion which specially affected the limits of authority."[2] The almost inevitable result was the uncertainty of many even of its most important rules.

It was the inadequacy of international law, as they knew it, which led so many eminent writers, including such men as Lieber, Bluntschli, Mancini, Field, Levy, Fiore and others, to support the proposal for codification, and which led some of them even to prepare draft codes. And their advocacy, naturally, was but strengthened by the considerable success of the so-called law-making conferences of the second half of the nineteenth century, which culminated in the two great conferences at The Hague.

Since the Great War the demand for a codification of inter-

[1] Bentham: *Works* (Ed. Bowring), Vol. VIII, p. 537.
[2] Westlake: *International Law* (1910), I, p. 247.

national law has become both more active and more "actual." It is often urged, for example, that the creation of the Permanent Court of International Justice has rendered indispensable a complete code of clear and precise rules which that Court can administer. In support, it is argued that the Powers only agreed to establish the International Prize Court in 1907 on condition that it should not be brought into existence until the rules of naval war had been drawn up. There is some logic in the argument; the connexion between the jurisdiction of the Court and the adequacy of international law is plain. In some countries the demand for codification has left such academic ground. In the United States of America it threatens almost to become an issue in national politics. A host of advocates are creating a popular belief that the right way to get rid of war, and to substitute justice for force, is to draw up a great new Benthamist code of international law.

The demand for codification, moreover, has now behind it the great authority of the Committee of Jurists who, in 1920, prepared for the Council of the League of Nations the first draft Statute for the Permanent Court of International Justice. In making their report to the Council, they submitted with their draft Statute a number of resolutions, of which this was the first:

"The Advisory Committee of Jurists . . . recommend that:

I. A new inter-State Conference, to carry on the work of the two first Conferences at The Hague, should be called as soon as possible for the purpose of:
   1. Re-establishing the existing rules of the Law of Nations, more especially and in the first place, those affected by the events of the recent War;
   2. Formulating and approving the modifications and additions rendered necessary or advisable by the War, and by the changes in the conditions of international life following upon this great struggle;
   3. Reconciling divergent opinions, and bringing about a general understanding concerning the rules which have been the subject of controversy;
   4. Giving special consideration to those points which are not, at the present time, adequately provided for, and of which a definite settlement by general agreement is required in the interests of international justice.

II. That the Institute of International Law, the American Institute of International Law, the Union juridique internationale, the International Law Association and the Iberian Institute of Comparative Law, should be invited to adopt any method, or use any system of collaboration that they may think fit, with a view to the preparation of draft plans to be submitted.

first to the various Governments, and then to the Conference, for the realization of this work.

III. That the new Conference should be called the Conference for the Advancement of International Law.

IV. That this Conference should be followed by periodical similar Conferences, at intervals sufficiently short to enable the work undertaken to be continued, in so far as it may be incomplete, with every prospect of success." [1]

This is a definite and practical proposal, put forward by a body of eminent international jurists acting in an official capacity on behalf of the society of States. It deserves, therefore, the most careful consideration. It is the purpose of this study to examine it, both in its theoretical and in its practical aspects.

II

It is necessary to any useful discussion of the question under consideration to define in the first place what is meant by the phrase "the codification of international law." It may be feared that many people who use it have only a vague conception of what they mean.

In the broadest sense, in the sense in which it is used by the propagandists in America, and also by some at least of the pre-war international lawyers, it means merely the making of a code; the setting forth in a written and authoritative form of the whole body of legal obligations which are to bind the members of international society. It is intended by those who so use the phrase that the code to be drawn up should supersede and take the place of the whole existing law. The process envisaged is similar in nature to that which was adopted in drawing up the municipal codes under which some great continental countries live.

But to say that codification means the making of a code conceals an ambiguity which it is important for both practical and theoretical reasons to remove. Is the code to be a code of the existing legal obligations of States, or a code of new law? Is it to be the existing law reduced to writing, classified, clarified, freed of confusions and contradictions; or is it to be a re-drafting of the rules of international law in accordance with a new conception of what the relations of States ought to be?

[1] *Permanent Court of International Justice: Advisory Committee of Jurists. Draft Scheme of the Committee with Reports to the Council of the League of Nations and Resolutions by the Council relating to it*, p. 119. See also the Additional Resolution (*ibid.*, p. 121) concerning the compulsory jurisdiction of the Permanent Court.

Undoubtedly the word has been used to mean both things, and also to mean a combination of them. The popular demand for the codification of international law in the United States is a demand for a new system of Utopian rules. Some international lawyers, on the other hand, who have written in favour of codification, have meant no more than the writing down of the rules as they exist. Others again have meant the making of a new body of rules founded on the existing law, but introducing amendments and additions which they believed to be required. This third meaning is evidently the one intended in the resolution of the Jurists' Committee quoted above. The purpose of their proposed Conference for the Advancement of International Law is not merely the establishment of previously existing rules, but also the drawing up of new rules where there has been no agreement hitherto.

Which of the two primary meanings given to the word "codification" is right? It is clearly necessary to answer this question, to remove the ambiguity it involves, and to explain in what sense the word "codification" will here be used. Is it to mean the writing down of existing law, or is it to mean the making of new law, either *in vacuo* or by the amendment or development of inadequate existing rules?

Broadly, the answer is that the word codification properly used means the writing down of existing law, and that the making of new law, either *in vacuo* or by the amendment or development of existing rules, ought to be termed legislation. This need not involve an absolutely rigid adherence to the distinction made. Codification may involve minor changes in the existing law and legislation may include the re-enactment of some parts of the existing law; but broadly the distinction is clear.

This use of the terms is in accordance with the best British opinion. In his discussion of the codification of parts of English law by means of consolidating statutes, Sir Frederick Pollock remarks that "a certain number of *well settled* portions of our general commercial law have been declared in statutory form, *codified* in fact"; and he says further, that the cases decided on the construction of these "codes" have been very few "and of those, almost all have been on questions of principle which the Acts had left open because the existing law left them open."[1]

[1] *First Book of Jurisprudence* (3rd ed.), p. 359.

In other words, the partial " codification " of English law which has been done by means of consolidating statutes, and which Sir Frederick Pollock approved and wished to continue, has been in a very rigid sense the writing down of the existing and accepted law, not the development of new law.[1]

This distinction between codification and legislation is not the less real, nor of less significance, because every code is in fact brought into force by a legislative process. Even if it is no more than the writing down in the strictest sense of existing unwritten or customary law, it becomes " statutory " law only as the result of action by the law-making authority. Similarly, in international law, a new code, even if it embodies nothing but the universally accepted rules of the existing system, could only come into force as a result of a process analogous to that of legislation. In Sir T. E. Holland's words—

" A written statement of . . . any branch of the law of nations can, of course, become binding only by means of convention ; since treaty-making on a large scale is the only substitute for legislation available to a group of independent political communities." [2]

This point, indeed, illustrates well one aspect of the practical importance of the distinction made between legislation and codification ; for an international convention at the best is not a very satisfactory substitute for a legislative process. The point is well put in some words from the same high authority :

" quasi-legislation by a congress is, strictly speaking, a contract, which binds only those who are parties to it ; though, if those parties are numerous and important enough, the moral weight of their formulated opinion is with difficulty resisted in the long run by a dissentient minority of the nations." [3]

It is clear that a convention establishing a code which consisted exclusively of the existing rules of international law would be more easily accepted as binding than a convention which introduced much new law. It would be very much more difficult for a " dissentient minority " to dispute its validity if it could plausibly be shown that they were already bound by all the customary rules of which it was but a new declaration.

Similarly—and it is another aspect of the practical importance of the distinction under discussion—if a convention were true

[1] Cf. also Holland : *Studies in International Law*, p. 77.
[2] *Op. cit.*, p. 82. Note the use of the word ' statement ', i. e. codification.
[3] *Ibid.*, p. 60.

codification, as the word is here used, it would very greatly facilitate the whole process of drawing it up, for it would radically affect the attitude of all the Governments taking part in its preparation. The fear of being led into new and dangerous obligations will necessarily restrict their co-operation in any such enterprise as the making of a new code. How important the point is, may be illustrated by a quotation from the instructions given to the British Delegate to the International Conference which met in 1874 at Brussels to codify the laws of war. He was instructed "to abstain from taking part in any discussion on points extending to general principles of international law not already universally recognized and accepted." [1] This point of view was, in fact, accepted by the whole Conference, the President of which announced that it had no other object than to "consacrer les règles universellement admises." The British instructions and the President's phrase not only show what was then the British view of the meaning of "codification of international law," but also show that this view was accepted by other Governments who believed that this process of codification would be useful.

It may be taken, therefore, that codification in its strict sense, and in the sense particularly in which it has been used by British writers and by the British Government, means the declaration of existing law. It will be so used in this study, while the word "legislation" will be used to indicate the means by which international law can be amended or added to, and by which new law can be made. Legislation, no doubt, is an inexact term to use in connexion with international law; but, as will be shown later, it is much more exact to-day than it was when the phrase "quasi-legislation" was first used by Holland in 1876. In its broad sense it conveys the right meaning, for the operations described later on as legislative are the processes which, in international society, properly correspond to legislation in a national State.

In codification, used in this narrow sense, and considered as a practical legal process, there are two essential points which differentiate it from legislation; the *purpose* with which it is undertaken and the *method* by which it is carried through.

The purpose of codification is of course to improve, not the substance, but the form of the law; to make its rules easier to

[1] *Parliamentary Papers*, 1875, LXXXII (c. 1128).

understand and to apply, not to alter the rules themselves. It is to improve the form of the law by getting rid of apparent ambiguities or conflicts, by bringing customary law and statutory law together into one coherent and consistent whole, and thus to clarify the obligations of the subjects of the law without adding to or diminishing those obligations.

The method of codification is likewise quite different from that of legislation, in that it is necessarily a work for professional lawyers alone. It can only be carried through by the intensive study by commissions of lawyers of existing rules, statutes, custom, practice, decisions of courts, &c. On the basis of such study the lawyers reduce their conclusions to writing for the acceptance of the law-making authority in substitution for the existing law. All the consolidating statutes in British legal history have been so drawn up. It is a work which, in Pollock's words, can only usefully be carried out by " proceeding with the utmost caution and employing the very best learning and skill that can be secured." [1] It is the same method of a lawyer's commission leading up to international conferences of lawyers which Oppenheim had in view in advocating before the war the codification of parts of international law.[2] It is again the same process which is proposed in the Resolution of the Jurists' Committee quoted above, except that as preparatory commissions they propose to use the existing academic Institutes of International Law.

The question, therefore, which has to be answered in the present study is this : Can the process of codification, as embodied in the two essential points just explained, be profitably employed for the improvement and development of international law ? In other words, is international law as it stands to-day a system which without material change of the existing rules can be improved by being written down in a simple and coherent form ? And if so, is the method of a lawyers' commission and lawyers' conferences the best method of carrying through the process ?

These questions must now be considered in relation to the two practical proposals mentioned above, which have been put forward by international lawyers : first, the proposal to make one single and complete code to govern all possible legal relations between the subjects of international law, which is the proposal

[1] *Op. cit.*, p. 363.

[2] *International Law*, (2nd ed.), I, p. 44.

of some of the nineteenth-century writers mentioned above, and of the Jurists' Committee, who intend that the work shall go on until it is "complete"; second, the proposal, put forward, among others, by Oppenheim, to codify certain restricted portions of international law which are considered to be "mature" enough for the purpose.

III

The following considerations are relevant to the proposal to make a single complete code by means of an international commission of lawyers followed by lawyers' conferences.

1. The analogy of the codification of municipal law must be briefly examined. Throughout history many new complete codes, from the Ten Commandments and the laws of Solon, down to the Code Napoléon, have been made; and most of them have given satisfactory results. But most of them have involved a great deal of new legislation, and they thus fall outside the scope of our definition of a "code." Moreover, the process of legislation by which they were drawn up is so unlike anything that is possible in the society of States, that no analogy of value can be drawn.

The analogy of English law, however, is of more use, for the reason that, like international law, English law has been built up very largely by custom and practice. And so far as the codification of English law is concerned, it is true to say that the best professional lawyers have nearly always been opposed to it. Both Sir Nicholas Bacon and Francis Bacon discussed the matter, and Francis Bacon actually proposed a digest of ancient legal rules; but his digest was to be for convenience only, not a new "text law"—that is to say, a "code."[1] "I dare not advise to cast the law into a new mould," he said, for the reason that he did not believe that any lawyers could be expert enough to draw up a written body of rules which should faithfully reproduce the law as it stood. The same hesitation has always been shown by the best English authorities. Pollock, in concluding in favour of the partial codification of "well-settled" parts of English law, makes it clear that he thinks the scope in which this work can be carried on is very narrowly limited, and that it should on no account be attempted in parts of the law where new legislation might be required as part of the code.

[1] Cited by Pollock, *op. cit.*, p. 354.

2. Oppenheim, in his admirable discussion of the proposal to codify international law, to which reference has already been made, summarizes the objections that are made against codification in general, and against the codification of international law in particular. The serious objections in his view are: first, that codification interferes with the "organic growth" of the law through usage and custom; second, that it brings into juridical literature and courts of justice what he calls "a hair-splitting tendency"; third, that it does not, in fact, do away with controversies altogether; and fourth, that whatever precautions are taken, the lawyers who carry out the work are bound to make mistakes. These objections will be dealt with later. For the moment, it is desired to point out that his conclusion concerning international law is the same as Pollock's concerning English law: that while the objections to codification have a certain validity, it is nevertheless desirable to carry out the codification of those parts—but of those parts only—of international law which are in his phrase "ripe," which, perhaps, may be taken to correspond to Pollock's phrase "well-settled." [1] Both this conclusion and his reasoning are supported by Holland, the first British authority to consider the subject, who, as long ago as 1876, wrote:

> "The time is not yet ripe for the codification of the laws and usages of war. An agreement as to the matter of which a body of law ought to consist, should precede any attempt to improve its form." [2]

If, then, it is accepted—as, with these authorities it surely can be—that the legal objections to codification are real and that they ought only to be overridden either in municipal or in international law in respect of those parts of the law which are "well-settled," it is possible to pass at once to the *prima facie* conclusion that the making of a single complete international code by the process of codification is not a suitable expedient for the improvement of international law. For every writer of authority agrees that some parts of international law are not "well settled," and that in other parts the disagreement of authorities or lack of conclusive practice goes so far as to leave complete gaps in the body of international rules.

3. If, nevertheless, an attempt were made to draw up a single code which would embrace even those parts of international law

[1] Oppenheim: *op. cit.*, I, p. 43.

[2] *Op. cit.*, p. 77.

concerning which there is no "agreement as to the matter of which the law ought to consist," it is clear that in respect of such parts the purpose in view could not be merely to improve the form of the obligations of international law; it would necessarily be to create new obligations. In other words, parts of such a code could not be produced by the sole process of codification, as the word is here used, but only by a process which would be largely that of legislation. If this be true, as it evidently is, the question next arises whether the method of codification by means of lawyers' commissions would really be the best way to secure the agreement of Governments that is required to give the new legislation binding force. Again, *prima facie*, it is not. In any such new legislation, questions of policy are certain to be involved, and the work of lawyers is not at all likely by itself to convince the Governments or to secure their consent.[1] This is only another way of saying that the difficulties which are found in codifying the unsettled parts of municipal law, difficulties which are universally recognized by competent lawyers, would equally arise in any attempt to codify the unsettled parts of international law. This is a strong practical argument against any attempt to make a single complete code by the method of codification.

4. This difficulty also arises in a very special way, which could scarcely have been realized by pre-war international lawyers, in connexion with some new branches of international law which are just coming into existence. These are branches in which common legal rules for controlling the relations between different Governments and between their subjects have not spontaneously evolved as these relations have developed; in which, in short, the law fell seriously behind the needs of a rapidly changing international society. These branches of law, which are destined without doubt to become of great importance, correspond to the social law, to the commercial law, to the sanitary law, &c., of a national State.

The present very rapid progress which is being made in the building up of these new branches of international law will be described later on. For the moment, it is only desired to point out that in respect of such branches of international law the process of codification cannot produce useful results; that the practical difficulties indicated in the last paragraphs would arise

[1] Cf. p. 43 above

in a very special degree; that, in short, the codifying method of lawyers' commissions, if not quite useless, would, at least, be less efficacious for achieving the purpose in view, namely the creation of new law, than the legislative methods by which it is already being done.

5. The objections so far brought against the proposal to draw up a single and complete code of international rules by the process of codification apply with equal force to another branch of international law, the laws of war, in connexion with which codification is frequently urged as most desirable. It is contended that, in the laws of war, there is a field for the making of a true code, and that its preparation would not only in itself achieve an important object, but would also produce a beneficial effect on the whole system of international law. There is no space here to argue the point, which has been dealt with elsewhere.[1] It can therefore only be dogmatically asserted that in the view of the present writer not only are great parts of the laws of war so unsettled as to be peculiarly open to the objections so far explained, but further, in his view, nothing could be so well calculated to impede and retard the satisfactory development of the general system of international law as an attempt at the present time to reduce the laws of war to the form of a code.

6. So far, the discussion of the proposal to make a single and complete code of international law has been confined to a consideration of several different aspects of its one fundamental difficulty—the difficulty that much of existing international law is not "well-settled" or "ripe." The arguments already adduced, though no doubt in one sense theoretical, are formidable and perhaps decisive: yet it may nevertheless be worth while to examine more in detail the other objections to codification which have been made, and to see if they apply to the proposal now being discussed.

The objection to codification in general, and to the codification of international law in particular, which is considered by Oppenheim as the most important, is that it cuts off, or at least seriously interferes with, the normal and spontaneous growth of the law. This objection is evidently one which applies with particular force in a society which, like the society of States to-day, is

[1] See "The League of Nations and the Laws of War" in *British Year Book of International Law*, 1920–1, p. 109.

changing and developing very fast. For this reason it may be suggested that Oppenheim was wrong in believing that it could be met by periodical revisions of whatever original code might be drawn up, although in fact such revision as he had in mind would be much easier, through the new legislative machinery now being developed in the society of States, than he could have foreseen. The possibility of revision does not at all meet the objection in question, as it applies at the present time to the codification of some of the more rapidly developing parts of international law.

For example, the Covenant of the League of Nations has profoundly affected some vital parts of international law. It has created important new relations between the members of the society of States. But the Covenant consists of general principles, not of detailed stipulations. It has laid down these general principles and left them to be worked out in practice by the Governments of the Members of the League. The question we must therefore ask concerning the parts of international law which the Covenant affects is this : Whether it would be better to allow a lawyers' commission to endeavour to codify the detailed results which follow in international law from the acceptance of the principles of the Covenant, or whether it would be better to allow custom and practice to work these results out by themselves.

The experience of the application of the more important principles of the Covenant up to the present time leaves little doubt that, both practically and theoretically, the latter is by far the better plan. Among other episodes, the Corfu dispute between Italy and Greece furnished strong support for this view. If a commission of lawyers had to make a detailed code concerning the legal issues raised in that dispute, their task would be difficult in the extreme. The actual results of the dispute show, on the other hand, that a customary law is rapidly growing up on the basis of the Covenant which will not only go much further in the direction of progressive development than any jurists' code could go, but which will also receive far readier acceptance from members of the society of States. And, most important of all, the new customary law so created will carry with it a political and moral force and authority which no lawyers' gloss could have.

Perhaps another lesser example of the same kind may be

found in the rules of international law which apply to the interpretation of treaties. Would it be better to make a jurists' code of these rules, or to allow them to be built up by the verdicts and opinions of the Permanent Court of International Justice? *Prima facie*, the argument in favour of the slower yet more elastic method of allowing the Court to make its own "jurisprudence" on the matter seems overwhelming. It is merely a special example of the general argument in favour of allowing the organic growth of the law where there is reasonable ground, as in this case there is, for expecting organic growth commensurate with the progress of society.

7. There is another objection, and an important one, to any attempt to make a single all-embracing code of international law. It is that the lawyers who drew up such a code would have the greatest difficulty in agreeing on the general principles upon which to found it.

It must be remembered that all continental lawyers, of whom any commission would necessarily for the most part consist, always begin any work of codification of law by the enunciation of its fundamental principles. A striking example, and one very much to the present point, is to be found in the draft code of the laws of war, prepared by the Institute of International Law in 1880.[1] The plan, moreover, is as a rule a good one. It greatly facilitates the work of classification or exposition. It has the approval of high British authorities [2] on jurisprudence, and it has been widely followed in English law-books and codifying statutes, many of which begin with what is known as a "General Part." It would indeed be difficult, if not impossible, to make a code of any considerable body of law without such a "General Part," in which the principles which "run through it" can be set out.

But the very necessity of the plan as an element in good codification is itself a strong argument against an attempt to make a single and complete code of international law. For any attempt by a commission of lawyers to reach agreement on the fundamental principles of international law under such headings as the independence and sovereignty of States, or of their legal equality, could to-day hardly fail to lead to disaster. It is just

[1] *Annuaire*, 1880–1. Reproduced in Hall's translation by Lorimer, *Institutes of the Law of Nations*, Vol. II, p. 403.

[2] Cf. Pollock, *op. cit.* p. 105.

these fundamental principles which have been vitally affected by the existence of the Covenant of the League of Nations. No doubt they call for intensive scientific work by individual international jurists, but no one familiar with current literature on the subject can believe that a codifying commission of lawyers could in this matter reach a successful result. Their attempt would in all probability provide the best possible illustration of Oppenheim's two other general objections to codification, for the lawyers engaged would no doubt indulge in unbridled "hair-splitting," and, almost equally certainly, they would make many grave mistakes.

8. There are, of course, many well-settled parts of international law concerning which a true code could easily be made. It may be suggested, however, that most of these parts of international law are neither intricate enough, nor, in our day, important enough, to make it worth the trouble of turning them into a code. They are not the parts of international law concerning which disputes are likely to arise, nor are they the parts on which its future development will most depend. So far as they are concerned, therefore, the advantages of making a general code are not of much account.

The following conclusions from the above argument may now perhaps be stated. First, a great part of any single, all-embracing code of international law must necessarily consist of new "legislation"; therefore no such code could have any international value without its definite acceptance and ratification by at least a great majority of the society of States. Second, this fact would make its preparation and entry into force an immensely long and laborious process. Third, the method of codification would not be well calculated to make Governments willing to accept the new legislation so prepared. Fourth, the process of codification would be unlikely, with regard to many important parts of international law, to lead to good results. Fifth—and this is the point to which attention will now be turned—the attempt to codify would retard the present very rapid and very hopeful growth of international law by the new legislative processes which are being evolved, and which are now to be described. Sixth, for these reasons, it is probably impossible, and certainly undesirable, to draw up a single and complete code of international law covering all legal relations between States.

IV

If then it is not desirable to draw up a single and complete code of international law, and if, as must be admitted by any one who has thought about the matter, it is nevertheless desirable that in some parts of international law new bodies of rules should be written down in a generally accepted and authoritative form, the second part of the problem arises—whether the codifying method can be used in such parts of international law for drawing up these new bodies of rules. To state it more clearly, is the method of making a series of partial codes by means of lawyers' commissions and general legal conferences the best means of securing the progressive development of international law which is required ?

It may be recalled again that this is the exact proposal put forward by some cautious and erudite writers on international law before the war ; for example, by Oppenheim, whose predominant quality was good judgment and sound common sense.

The questions we must answer are : first, whether the codifying method is a practicable method for achieving the end in view ; and second, whether, if a practicable method, it is the best. Naturally, the answers must depend largely on the nature of the new bodies of written rules that are required. If the arguments put forward in Section III above are accepted, it follows that in those branches of international law in which new written rules would serve a useful purpose, there is not, generally speaking, an adequate legal basis of existing customary rules upon which a code, in the strict sense of the word, can be built up. In other words, it is not partial " codification," but legislation, that is required ; for the parts of international law that now need development by written bodies of rules are those parts in which international law has fallen behind the evolution of international society. In the preparation of these new rules, therefore, neither existing legal practice nor the general principles of the existing system of international law are of great importance. To put it in another way, the function of the lawyer in the preparation of these new rules must be subordinate to the function of the statesman and the expert.[1] *A priori*, therefore, the answer to the questions

[1] This argument does not, of course, apply to all parts of international jurisprudence. For example, the proposals made long ago by the Institute of International Law for the preparation, by means of lawyers' commissions and conferences, of common rules of private international law, might very usefully be revived. Cf. Lorimer, *op. cit.*, Vol. II, p. 526.

that have been asked is that the codifying method is not a good method, and probably not even a practicable method, of achieving the desired development of international law.

This *a priori* view is supported by a further consideration. When international lawyers before the war proposed codification by the successive preparation of a series of partial codes, they had before them no alternative method of promoting the rapid development of international law. Their chief hope lay in what to them seemed the highly successful work of the Hague Conferences. Their proposals for codification were intended to facilitate the work of subsequent conferences of the same sort. But now the position is changed. There are now alternative methods of developing international law, and some of them are being widely and successfully used. These alternative methods have been spoken of above [1] as the new " legislative " processes of international society. The phrase will be adhered to, for it gives a true conception both of the processes themselves and of their significance in the international system. The adequacy of these processes for promoting the progress of international law, and in consequence the validity of the main contention here put forward, can, however, only be tested by an examination of their nature and of their results. A description will therefore be attempted of the international legislation at present going on.

The most important of the legislative processes now being developed in the society of States is of course the general law-making convention. It is not a new process. As has been said, it was used to a considerable extent before the war. The best known of the pre-war law-making conventions related to the laws of war, but in other spheres general conventions were also made. Such, for example, were the conventions which established the Universal Postal Union, the International Telegraphic Bureau, the International Office of Public Health, the International Institute for Protection of Industrial Property, &c., &c. These conventions were important rather as precedents than in themselves.

Since the war, and particularly since the institution of the League of Nations, the volume of new international law created, or in process of creation, by general convention, has very rapidly increased, and is now greater than is generally realized. This new law, as has been mentioned above, roughly corresponds in

[1] See p. 51.

nature to the branches of a municipal legal system which related to constitutional law, commercial law and social law. As an appreciation of its extent and its importance is essential to the present point, a brief review of it may perhaps be given.

The Covenant of the League of Nations is itself the first, and much the most important, of the new bodies of written rules. It has established a political constitution and political institutions for international society; it has profoundly modified the fundamental right of war which existed before its establishment; and it has modified in important respects the basic principles upon which the legal relations of States were previously founded. It is difficult, therefore, to exaggerate its importance in the general system of international law.

From the terms of the Covenant there have resulted other international statutes, which may also roughly be classed as constitutional, and which are only less notable—the Statute of the Permanent Court of International Justice, and the Mandates under which are governed a large number of different territories throughout the world. In addition, there are a number of new obligations, resulting from the Treaties of Peace, accepted by certain countries only, but nevertheless of general importance; for example, the treaties by which is set up the system of international protection for racial, linguistic and religious minorities. There were such treaties before the war, but since the war the system has been greatly extended. There are now fourteen countries bound, either by the Peace Treaties, or by arrangements to which they have agreed as a condition of their admission to the League of Nations, to grant full and equal rights of citizenship to their minorities. These obligations are recognized as a matter of general concern to international society, and as of importance to the peace of the world. For this reason their observance is placed under the supervision and guarantee of the political organs of the League.

That branch of international law which corresponds to the social law of a national State was singularly immature before the establishment of the League of Nations. Only a faint beginning had been made towards the acceptance of common rules and the preparation of common action for promoting the great international social interests which were at stake. Since the establishment of the League, however, there has been a rapid development. The most notable part of this practically new branch of inter-

national law consists no doubt of the conventions prepared by the International Labour Organization. These conventions already number thirteen. They have been prepared by three separate international conferences, and include conventions relating to such important subjects as hours of labour per week; the employment of women at night; the employment of children; the rights and welfare of seamen on merchant vessels; the use of white lead in paint, &c. Most of these conventions have already received a considerable number of ratifications, and there is no reason to doubt that, in due course, they will become binding on practically all the civilized States of the world.

Under the heading "social law" there come also such conventions as those which deal with the opium traffic, the white slave traffic and similar subjects. The first Opium Convention was made in 1912, but by 1919 it had only been brought into force by four or five Governments. It has now been brought into force by forty-five Governments, while a new and more far-reaching convention is being prepared, and in all probability will be signed at a further general Opium Conference summoned for November, 1924. Similarly, new conventions for the suppression of the traffic in women and children, and of the circulation of and traffic in obscene publications, were made at special conferences convened by the League of Nations in 1921 and 1923 respectively; both of these were founded on earlier pre-war conventions which a few States had brought into force. The Convention on Obscene Publications had at the date of closure for original signatures (March 31, 1924) already received the signature of forty-two States.

There remains the third branch of the new conventional international law referred to above—the branch which corresponds to the commercial and technical law of a national State. This again is a branch in which international law has, up to the present time, been singularly immature, in the sense that there were few generally accepted rules for the regulation of the most important common international interests involved. Since 1920, however, the technical organizations of the League of Nations have made great progress in the preparation of such rules. The most important of the rules already actually drawn up are embodied in the eight new conventions prepared by the two Transit Conferences held at Barcelona in 1921 and at Geneva in 1923, which deal with such subjects as the freedom of transit,

the régime of navigable waterways of international concern, the right to a flag of States having no sea coast, the international régime of railways, the international régime of ports, and the use of water power from international rivers for hydraulic purposes. It is necessary to add to these the Aerial Navigation Convention, prepared and signed in 1919. It is evident that these conventions deal with matters of vital importance to the international trade of the world, upon which the prosperity of practically every civilized State now depends. It is also evident that they constitute a comprehensive, a detailed, and a long overdue application of the fundamental general principle concerning international rivers, accepted for the first time a century ago at the Congress of Vienna.[1]

In a similar but different sphere other new conventions for facilitating international trade have been drawn up—for example, a convention concerning customs formalities, and a protocol concerning arbitration clauses in commercial contracts, both in 1923. In the same sphere preparatory work is being done which it is hoped may result in due course in conventions concerning such different topics of international concern as double taxation, fiscal evasion, bills of exchange, the reform of the calendar, international motor licences, &c.

In yet another sphere a new general Sanitary Convention is being prepared, while a proposal made by the Dutch Government for a new convention concerning the sanitary control of ports is under consideration.

It may perhaps be said that few of these conventions have yet received general ratification, and that therefore it is quite inaccurate to speak of them as part of the law of nations. On the other hand, it is to be remembered that they are all in the strictest sense general conventions, dealing with subjects of common interest concerning which common rules are needed; that they are prepared, for the most part, by conferences representing the society of States as a whole, and that they are drafted in the form of general rules capable of universal application. It is also to be remembered that, in fact, a far greater number of States have participated both in the preliminary preparation and in the conferences which agreed to the conventions than ever participated in similar conferences before the war. It is certain that no other competing general conventions

[1] Cf. Hall: *International Law*, (6th ed.), p. 137.

will be made on the same subjects. On the contrary, the process of ratification of these conventions is going on steadily, and on the whole satisfactorily, and there is no reason to doubt that they will, in due course, be brought into effect by the great body of civilized States. It seems, therefore, entirely justifiable to speak of them even now as additions to important branches of the general system of international law.

In addition to the above new conventional international law, there are a number of other partial political arrangements which have been brought into effect through the machinery of the League of Nations, and which, though they are embodied in treaties signed only by a restricted number of States, nevertheless constitute an essential part of the existing world law. International lawyers before the war always counted the guaranteed neutrality of Belgium as part of the law of Europe. Similarly, it is now necessary to count as part of the law of Europe the treaty made in 1921 by which the Aaland Islands were neutralized. The treaty, though signed by only ten States, is placed under the guarantee of the Council of the League, and is thus legally, as it is clear it must be politically, a matter of general concern. Similarly, the Geneva protocols, under which the financial reconstruction of Austria has been carried out, were signed only by eight States, but they were prepared by the Council of the League on behalf of all its Members, and they embody important political arrangements which are evidently a permanent and an important part of the European system. The protocols for the financial reconstruction of Hungary are another example of the same thing.

There is yet another method by which it is possible to hold that international law is being developed at the present time. This is by the customary practice and the resolutions of the Assembly of the League of Nations. It may seem strange that rules or arrangements so made should be called international law. It is neverthcless the fact that the practice of four successive Assemblics is establishing rules concerning, for example, the preparation of the international budget of the League, which are rapidly acquiring, if they havc not already acquired, a binding legal force on the Members of the League, although they are in many respects quite outsidc the obligations into which these Members have under the Covenant entered. Similarly, there have been a number of Assembly resolutions accepted by all the

Members of the League as definitely binding. Hitherto this method of resolution has only been used in a narrowly restricted sphere, and for purposes which may perhaps be described as quasi-administrative. For example, it was by Assembly resolutions that the Permanent Health Organization of the League, the standing Transit, Economic and Financial Committees, the Advisory Committees on the Opium Traffic, and the Traffic in Women and Children, were all brought into existence. It is true that the Covenant provides that the League shall carry out certain functions in connexion with each of the different subjects with which these permanent organisms are designed respectively to deal. But the Assembly resolutions in question go far beyond the mere interpretation of the intention of the Covenant. They establish permanent organs which are rapidly becoming an essential part of the general inter-Governmental machinery of the League, which have power to control the expenditure of large parts of the League budget, which fulfil the important functions of preparing treaties and supervising their execution, &c., &c. What was done by these Assembly resolutions was, in short, something which in a national State could only be done by the legislation of the law-making authority. It is therefore reasonably accurate to say that in the use of Assembly resolutions there lies another quasi-legislative method of improving international law, though it is one which at present is in an embryonic stage of development. It is no doubt premature for international lawyers to consider how they can promote the greater use of this method; but it is right for them to realize its existence and closely to watch its growth.

V

It will be evident from the review which has been given that the development of international law now going on through various quasi-legislative processes is considerable in scope. Much of it may not seem at first sight of great importance. Its true significance lies in the fact that it is for the first time regulating by legal rules the new international interests which result from the growing interdependence of the members of the society of States. At first sight, moreover, the process may seem slow. But if the development of the last few years is compared with what was done in any period before the creation of the League

of Nations, it will be seen that it constitutes in fact a remarkably rapid growth of the international Law of Peace, a growth for which there is an almost unlimited field, and which, according to present indications, will become more rapid every year.

It will also be evident from this review that, of the various quasi-legislative methods discussed, much the most important is the general convention. It follows that one direction in which there is hope for the advancement of international law—and much greater hope than in any more ambitious attempt to codify—lies in the improvement of the system of general conventions, and in the removal of the difficulties which are encountered in the work of drawing them up and bringing them into force.

This work is necessarily difficult and slow. To make a general convention on a subject of general importance that can be claimed as part of the law of nations, it is necessary to secure first the preliminary agreement, then the signature, and finally the ratification, of the great majority of the civilized Powers of the world. How difficult the process was with the machinery of diplomacy was shown by many of the attempts of the nineteenth century to make such conventions. In one respect the process is becoming more difficult even than it was then, for now the securing of final consent by ratification is a matter which can rarely, if ever, be left in the hands of the delegates who do the actual work. These delegates must now always refer back to their Governments, who in their turn must, in nearly every civilized country, refer to Parliament. This is no doubt essential and desirable under any system of democratic government, but clearly it adds to the difficulties and delays of bringing general conventions into force.

On the other hand, the existence of the permanent institutions of the League of Nations has rendered the whole process much simpler and more effective. A summary may perhaps be given of the advantages which have followed from the use of these institutions in the making of the general conventions above described. First, the great difficulty of initiative has been almost completely overcome. Under the old system, a prolonged multilateral diplomatic correspondence was necessary before a desired conference could be even projected. Now it is only necessary for any Power which wishes to do so to lay a proposal before the Council or Assembly of the League; if the proposal

receives adequate support, machinery for the preparation of a convention is automatically set in motion. On a number of matters the initiative has even been taken by the technical commissions of the League.

Second, the difficulty of securing preliminary agreement to the main principles of the desired convention has been greatly diminished. The obstacles under the old system were so great that frequently a whole series of conferences were required. Now, the Council of the League entrusts the preliminary work to some small body of international experts—either one of the standing technical commissions of the League, such as the Transit, Health, Economic or other Commissions, or a special *ad hoc* Commission. These experts make a preliminary draft which is submitted to the Governments. In the light of the Governments' observations, the experts prepare a new draft, which is finally laid before an international conference. The importance of this preparatory work is great.

Third, the holding of the conferences at which the conventions are agreed to, is much facilitated by the new system. The Council, instead of an individual Government, summons the conference ; the standing Secretariat of the League carries out the necessary material organization and provides an expert staff. The cost—like the cost of the preparatory commissions—is met from the League budget. Intangible, perhaps, but most important of all, the conference meets not as an isolated international entity, but as part of a great international organization, and the power of the whole enters into each of its parts.

Fourth, it has sometimes occurred that on matters of political importance, the Council or the Assembly have been able to secure agreement among the Governments, when it might not otherwise have been secured. An example is furnished by the history of the Statute of the Permanent Court of International Justice.

Fifth, the protocols of signature and ratification of conventions made under the new system are all kept at the seat of the League ; the conventions are published in its official journals ; new signatures and ratifications are notified by the Secretariat to all Governments, whether signatory to the conventions or not.

Sixth, the most important element in the success of this new quasi-legislative process is the pressure exerted by the Council

and the Assembly on the different Governments, to secure their signature and ratification of conventions recognized to be in the general interest. Sometimes this pressure is exerted openly and vigorously, particularly at meetings of the Assembly. Sometimes it is exerted by the mere discussion at regular intervals in the Council and the Assembly of the subjects with which the conventions deal.

Finally, in addition to all the above advantages, which collectively are great, there can be no doubt that the preparation of the conventions through a permanent international organization representing the whole society of States in itself leads to an increase of interest, and thus, directly or indirectly, to a quickening in the process of securing governmental consent.

That there has been such a quickening can be proved by a few examples, which are typical of many. There are two questions which were dealt with both before the war by the old methods, and again recently by the new—the white slave traffic and the opium traffic. In 1904 an international agreement was made at a conference in Paris concerning the white slave traffic. During the eleven years which elapsed before the war, only ten Governments had brought that agreement into force. In 1921 a new White Slave Convention was prepared at an expert conference and opened for signature at the second Assembly. In the succeeding two years that convention received the signature of thirty-six States, and was ratified by twenty of them, while a number of others have applied its provisions without even waiting to ratify. Similarly, four diplomatic conferences were held on the subject of the opium traffic between 1907 and the war, which ultimately resulted in the Opium Convention of 1912. At the outbreak of the war that convention had been brought into force by only four Governments. Since the matter has been dealt with through the League, the convention has been signed by fifty States and brought into force by forty-five of them.

Perhaps a more normal example of the rapidity of action which can be expected is furnished by the Transit Conventions of Barcelona. The Convention on Freedom of Transit made in 1921 has now (March 1924) received the signature of thirty-five States, and has been ratified by nineteen. The Convention on International Waterways has been signed by thirty-one States and ratified by thirteen. An illustration of the best possible result that can be expected from the present system is perhaps

furnished by the Statute of the Permanent Court of International Justice. This Statute, prepared in 1920 by a Special Commission of Jurists, was opened for signature at the Assembly in November 1920. It provided that it should come into force when it had been ratified by more than half the Members of the League, i. e. at that time by twenty-five States. Before the Second Assembly, only nine months later, over thirty ratifications had been received.

VI

Such is a brief summary of the improvements introduced by the establishment of the permanent institutions of the League of Nations into the machinery for making general conventions and bringing them into force. Are there other ways in which this machinery can be still improved ? Some suggestions may, perhaps, be made concerning the process of securing signatures and ratifications, which an examination of the history of the general conventions drawn up since 1920 indicates to be the point on which further progress is both most necessary and least difficult. These suggestions are put forward as measures which might be taken without any radical change in the accepted doctrines and the existing machinery of international society. They by no means exhaust the possibilities of what might be done. They would only be cautious first steps ; perhaps for that reason they merit consideration.

The first of these ways is very simple. It consists in arranging that the final discussion and actual signature of a general convention should take place not at the technical conference which prepares it, but at the Assembly of the League. This method has the advantage that it secures a general international discussion of the subject with which the convention deals, both in the technical conference, and in the much more important forum of the Assembly. This in its turn secures immediate signature by a greater number of countries, and further, makes the delegates who have signed anxious to secure the ratification of their signatures by their Governments before the next meeting of the Assembly a year later. The method is one which has been tried up to the present time in connexion with four conventions—the Statute of the Permanent Court of International Justice, the Optional Protocol for Obligatory Jurisdiction attached to that Statute, the White Slave Convention of 1921, and the Protocol

on Commercial Arbitration Clauses of 1923. The results have been encouraging.

A more substantial and therefore perhaps more difficult step would be to insert in conventions the provision that the ratification of every signatory Power would be assumed, unless within a certain fixed period it informed the other signatory Powers that it did not propose to ratify. There would, of course, be disadvantages, as well as advantages, in such an arrangement. It might at first cause Governments to show more reluctance in appending their original signatures to conventions. But such reluctance would be quite illogical, and if the provision were once adopted, it might well prove effective in overcoming the present slowness of the ratifying process, in so far as that slowness is merely due—as no doubt in great part it is—to the forces of inertia.

It would, of course, be simplest to insert the provision just described into each general convention as it was made, and it is probable that in this way it would most easily obtain the consent of Governments. An alternative which might be adopted if the practice of making general conventions through the machinery of the Assembly were much extended, would be to make it a standing rule of the Assembly that ratification of any convention accepted at an Assembly would be assumed unless a Government intimated its unwillingness to ratify before the opening of the succeeding Assembly. It is probable, however, that at the present stage of development this latter alternative would meet with opposition, whereas there seems to be no obvious reason why the former should not be adopted forthwith.

Another, and more ambitious, way of securing the end in view would be to adopt as part of the general machinery of the League the procedure established by Article 405 of the Treaty of Versailles for the International Labour Organization. By this procedure any convention which is accepted by a two-thirds majority of the delegates to the Labour Conference must be presented by every Government belonging to the organization for discussion by its legislative or ratifying authority within a certain fixed period. In the Labour Organization the normal period is one year with exceptional extensions to eighteen months. There is no reason why in due course this procedure should not be adopted in respect of all general conventions whether prepared at the Assembly or at any international

conference. The simplest method of securing its adoption would no doubt again be by the insertion of a provision in each convention as made. If such an arrangement were in fact adopted, together with the plan suggested above of " assuming " ratification within a short period of months and of obliging signatory Powers which have not ratified to report to the succeeding Assembly why they have not ratified, it cannot be doubted that the forces of inertia would be as far as possible overcome, and that general conventions which are clearly in the common interest would only remain unratified in cases where Governments had genuine reasons for delay or valid objections to bringing them into force.

VII

If it be true, as has been urged above, that development by the quasi-legislative process of general convention is the most hopeful means for the early improvement of the general system of international law, then it may fairly be claimed that the suggestions put forward in the preceding section for the improvement of the technical methods of drawing up general conventions and of bringing them into force, merit the serious consideration of international lawyers and of statesmen interested in the development of the law of nations. It may even be claimed that this is one of the most important ways, if not the most important way, in which international lawyers and statesmen can stimulate and promote the spontaneous growth and development of the international legal system that is now going on.

The general conclusions which are reached, therefore, as the result of the above discussion are these. First, the making of a single comprehensive code of international law governing all the legal relations between the members of the society of States is not practicable, and, even if it were, the codifying method by lawyers' commissions and conferences would not be a satisfactory means of achieving the end in view. Second, even for the drawing up of written bodies of rules concerning certain restricted parts of international law, the method of codification is not one that is well adapted to the needs of the situation, nor one which statesmen should now endeavour to employ. The main reason for these views, upon which the above argument has been founded, is that there is now in process of evolution in the institutions of the League of Nations a working and hopeful

alternative to the method of codification, an alternative which, being genuinely legislative in character, is more elastic and adaptable than the codifying system, which will permit development as fast as international society is ready for it, and which will in no way restrict—as codification might do—the spontaneous growth in other ways of the rules of international law. It is therefore to the improvement of this alternative method that those who are interested in the matter should direct their attention, for in this improvement lies the hope of progress.

THE *TRENT* AND THE *CHINA*

THE REMOVAL OF ENEMY PERSONS FROM NEUTRAL VESSELS

By H. W. MALKIN, C.B., C.M.G.

THE American Civil War and the recent war each produced one important case in which the right to remove enemy nationals from a neutral merchant ship formed the subject of discussion between the United States and Great Britain. In the case of the *Trent* the ship was British and the British Government obtained the release of the persons who had been removed by an American cruiser. In the case of the *China* the ship was American and the enemy persons who had been removed from her were ultimately released as the result of representations made by the Government of the United States. Despite this result, consideration of the arguments employed in the two cases does not indicate that the rules of international law as it stood when the two incidents respectively occurred could be regarded as clear and undisputed, and some examination of the question may, therefore, be of interest.

It has always been admitted that there are certain cases in which the carriage of enemy nationals by a neutral ship renders the ship liable to capture and condemnation in the prize court of a belligerent. But quite apart from this it appears that there formerly existed to a considerable extent a practice of taking enemy subjects out of a neutral ship, without capturing the vessel or bringing her before a prize court. In consequence of this practice a series of treaties, of which the earliest appears to have been made in 1675 and the latest in 1851, was entered into, providing that enemy subjects should not be taken off neutral ships unless they were, to quote a description which occurs in several of these treaties, " military persons and effectively in the service of the enemy." As an example of such a provision, Article 17 of the Commercial Treaty of Utrecht may be quoted :

" . . . Et comme il a été stipulé par rapport aux Navires & aux Marchandises, que les Vaisseaux libres rendront les Marchandises libres, & que l'on regardera comme libres tout ce qui sera trouvé sur les Vaisseaux appartenans

aux Sujets de l'un ou de l'autre Royaume, quoyque tout le chargement, ou une partie de ce même chargement, appartienne aux Ennemis de Leurs dites Majestez, à l'exception cependant des Marchandises de contrebande, lesquelles étant interceptées, il sera procedé conformement à l'esprit des Articles suivans. De même il a été convenu que cette même liberté doit s'étendre aussi aux personnes qui navigent sur un Vaisseau libre ; de manière que, quoyqu'elles soient Ennemies des deux Parties, ou de l'une d'Elles, elles ne seront point tirées du Vaisseau libre, si ce n'est que ce fussent des Gens de guerre actuellement au service des dits ennemis."

Great Britain was a party to at least two treaties of this description, and the United States to a considerable number, but no such treaty was ever made between the two countries.[1]

The earlier treaties in this series were no doubt made at a time when the necessity for submitting to the adjudication of a prize court the acts of a belligerent against neutral commeree was not fully recognized, but it seems difficult to dispute that the original object of these treaties was to limit a right which was generally admitted ; in which case a belligerent who was not a party to treaties of this description would have been entitled to remove any enemy individuals from a neutral ship. On the other hand it might be maintained that the rule laid down in these treaties had gradually become a general rule of international law, of which the later treaties were merely declaratory, in which case any belligerent would have possessed the right to remove " military persons effectively in the service of the enemy," but no others, from a neutral ship.[2] Such a view might well have been supported by the analogy of Article 2 of the Declaration of Paris.

In 1861 occurred the case of the *Trent*. It is unnecessary to recall the well-known facts of the case, nor is the question of the diplomatic status of Messrs. Slidell and Mason material to the present discussion ; but it is important to ascertain the exact contentions advanced on each side, and in particular the attitude adopted by the Government of the United States. Lord Russell's original despatch of November 30, 1861, did not embark on any discussion of the position under international law ; it confined itself to stating that :

" It thus appears that certain individuals have been forcibly taken from on

[1] See Dana's edition of Wheaton's *International Law* (1866), pp. 656–9, where a list of twenty such treaties is given.

[2] This is apparently the view which the French Government took in their note on the *Trent* case (Bernard : *Neutrality of Great Britain during the American Civil War*,

board a British vessel, the ship of a neutral Power, while such vessel was pursuing a lawful and innocent voyage, an act of violence which was an affront to the British flag and a violation of international law."

Mr. Seward's reply said that the question involved the following inquiries, and that if all these were resolved in the affirmative, the British Government would have no claim for reparation :

" 1st. Were the persons named and their supposed despatches contraband of war ?

2nd. Might Captain Wilkes lawfully stop and search the *Trent* for these contraband persons and despatches ?

3rd. Did he exercise that right in a lawful and proper manner ?

4th. Having found the contraband persons on board, and in presumed possession of the contraband despatches, had he a right to capture the persons ?

5th. Did he exercise that right of capture in the manner allowed and recognized by the law of nations ? "

Mr. Seward answered the first four questions in the affirmative. His ultimate decision to release Messrs. Slidell and Mason was entirely based on the fact that he found himself unable to give a similar answer to the fifth. As to this his view was that the action of Captain Wilkes in releasing the *Trent* after capturing " the contraband persons " had prevented the capture being made the subject of the judicial proceedings which in his opinion ought to have taken place, and that the United States were only entitled to retain the custody of the captured persons if it were shown that the release of the *Trent* instead of bringing her in for adjudication was necessary. If, according to Mr. Seward, the circumstances had been such as to excuse the captor from sending the ship into port for confiscation, the right of the captor to the custody of the captured persons and to dispose of them if they were really contraband so as to defeat their unlawful purposes could not reasonably be denied. In the present case Mr. Seward considered that the reasons which induced Captain Wilkes to release the *Trent* were not sufficient to show that his action was necessary, and on that ground, and on that ground alone, the prisoners were released.

Lord Russell's reply dealt at considerable length with the first of Mr. Seward's five questions and came to the conclusion that Messrs. Slidell and Mason and their supposed despatches could not be regarded as contraband of war. Having reached this conclusion, Lord Russell did not discuss the other four questions raised by Mr. Seward.

The course which this discussion took is interesting and perhaps somewhat surprising. No reference was made to the series of treaties which have been referred to above, although it was only ten years since the United States had concluded the last of the treaties in question, that with Peru. One would have expected the discussion to proceed on the lines that a belligerent right existed to remove at any rate certain classes of enemy persons from a neutral ship without capturing the ship and bringing her in for adjudication, and that the only question was whether Messrs. Slidell and Mason could be regarded as falling within any of these classes. Inasmuch as Mr. Seward contended that Messrs. Slidell and Mason were " contraband " and spoke of the belligerent captor's " right to prevent the contraband officer, soldier, sailor, *minister, messenger, or courier*, from proceeding in his unlawful voyage, and reaching the destined scene of his injurious service," it would seem that he would have maintained that they were to be so regarded. But he did not make use of any such argument. The reason may perhaps be found in a passage towards the end of his note, in which he refers to the old controversy resulting from the claim of Great Britain to take out of American ships seamen who were claimed as British subjects. The two cases are not altogether analogous, but Mr. Seward stated that the attitude he adopted as regards his fifth point was identical with that which had been maintained by Madison at the time of the controversy referred to, and it would appear probable that this consideration was the determining factor in the decision to release the prisoners.

In the light of this examination of the correspondence, it is not easy to say that any rule of international law emerged with precision from the case of the *Trent*. Dana says that : [1]

" This celebrated case can be considered as having settled but one principle and that had substantially ceased to be a disputed question ; viz : that a public ship, though of a nation at war, cannot take persons out of a neutral vessel at sea whatever may be the claim of her Government on those persons."

Whether this had substantially ceased to be a disputed question may be doubted, but it is certainly not the case that Mr. Seward admitted the principle in the way Dana states it. The most that the *Trent* case could be regarded as establishing, as against the United States, was that " contraband persons " on a neutral vessel could not be captured without bringing the vessel in for

[1] Note to his edition of Wheaton's *International Law*, p. 648.

adjudication, except where there were circumstances which would excuse the captor from bringing the vessel in for that purpose.

However, some of the commentators on the case of the *Trent* laid it down as the rule to be deduced from that case that no persons at all may be removed from a neutral vessel without bringing the vessel herself into the prize court, while others held the rule to be that removal was only permissible in the case of members of the forces of the enemy. British opinion as a whole seems to have favoured the first alternative, which is supported by the fact that Mr. Seward's argument made no distinction between military persons as such and other enemy nationals. It is perhaps worth while to point out that as between States who were still parties to any of the treaties referred to above, the treaty position could not be affected by the *Trent* case.

There the matter rested until the London Naval Conference of 1909.[1] The Declaration of London, which in certain circumstances allowed the removal of contraband from a neutral vessel without bringing the ship in, also provided (Article 47) for the removal from neutral vessels of individuals "embodied in the armed forces of the enemy" even though there was no ground for the capture of the vessel. If the Declaration had ever become binding there would, therefore, have been a reversion to the rule laid down by the old treaties referred to above, and the class of persons who might be removed was identical with that prescribed in those treaties. If therefore the *Trent* case did really establish a rule forbidding the removal of any enemy persons from a neutral ship, that rule would have been superseded by the Declaration. Continental opinion seems to have regarded Article 47 as merely reproducing an existing rule of international law, while British opinion tended to regard it as an innovation.

Article 45 of the Declaration provided for the condemnation of a neutral vessel which was on a voyage specially undertaken with a view to the transport of individual passengers who were embodied in the armed forces of the enemy. The report of the Drafting Committee stated that this definition was not to include reservists who were on their way to their native country to take

[1] One of the reasons given for the capture of the *Bundesrath* in 1900 was that among her passengers were a number of persons who were on their way to join the Boer forces, but as the ship was captured there was no question of removing the intending combatants.

their place in the ranks. This limitation is not mentioned in the report in relation to Article 47, but it was generally regarded as applying to it. Consequently when on the outbreak of war the Declaration of London with certain modifications was adopted by the Allied Powers, reservists returning to the enemy countries were not removed, but this practice was altered as early as November 1, 1914, when notice was given that in view of the action taken by the German forces in Belgium and France in deporting as prisoners of war all persons who were liable to military service, instructions had been given that all enemy reservists on neutral vessels should be made prisoners of war. This resulted in a few unimportant cases in which individual Germans who had been removed from American ships were released by the Allies,[1] but the question did not become of real importance until the case of the *China* occurred in February, 1916.[2] The facts of that case, as stated by the British Government, were as follows :

" From actual occurrences and from reliable information received it has been definitely established that the Germans resident in Shanghai have been engaged for some time past in the collection of arms and ammunition, both for clandestine transmission to India and, if possible, for the arming of a ship to play the part of a Far Eastern *Moewe*. His Majesty's Government were able to cope with this activity to a considerable extent and obtain the arrest of various German agents caught in the act of attempting to smuggle arms out of Shanghai ; further, the Germans became aware that His Majesty's Government knew of their plots. The commander-in-chief, China station, received information that owing to this fact the Germans were planning to shift the centre of their activity from Shanghai to Manila. Subsequently he was definitely informed that thirty-five Germans had planned to leave Shanghai in the steamship *China* and proceed to Manila.

His Majesty's ships were sent to patrol off the mouth of the Yangtze with the view of intercepting this party. The date of the *China's* departure was more than once postponed, but she eventually sailed, was intercepted by His Majesty's ship *Laurentic* and found to have on board Germans and Austrians corresponding to those concerning whom information as mentioned above had been received. The *Laurentic* therefore had no hesitation in removing them. The next ostensible port of call of the *China* was Nagasaki, a convenient place at which to transfer to another vessel proceeding to Manila.

It may be added that subsequent information fully confirms that the movement of the body of Germans in question was an integral part of the plot referred to above."

[1] Particulars of these cases are given in Garner's *International Law and the World War*, Vol. II, pp. 362–6. In one of the cases, that of Piepenbrink, the United States Government relied on the attitude of the British and French Governments in the *Trent* case in support of their demand for release.

[2] The case is discussed in Hyde's *International Law*, Vol. II, pp. 639–42.

Thirty-eight enemy subjects were thus removed from the American ship *China*, of whom the majority were Germans, although some were Austrians and Turks.

On February 23, 1916, the American Ambassador in London was instructed to demand the immediate release of the persons in question, the grounds given being as follows :

" As it is understood that none of the men taken from the *China* were incorporated in the armed forces of the enemies of Great Britain, the action of the *Laurentic* must be regarded by this Government as an unwarranted invasion of the sovereignty of American vessels on the high seas. After the notice given to the British Government of this Government's attitude in the *Piepenbrink* case in March last, which was based upon the principle contended for by Earl Russell in the *Trent* case, this Government is surprised at this exercise of belligerent power on the high seas far removed from the zone of hostile operations."

The British Government replied on March 16, 1916, in a long note,[1] the arguments of which may be summarized as follows. Article 47 of the Declaration of London showed that the principle that certain classes of persons might be removed from a neutral ship was now generally admitted; in the present war the belligerent activity of the Central Powers was by no means confined to the actual theatres of military operations, and enemy agents had been engaged in many parts of the world in political intrigues, revolutionary plots, schemes for attacking the seaborne trade of the Allies, endeavours to facilitate the operations of ships engaged in this task, and in criminal enterprises of different kinds directed against the property of neutrals and belligerents alike. In view of the nature of the activities of the persons removed from the *China* it was contended that persons of that description must fall within the category of persons who might, without any infraction of the sovereignty of a neutral State, be removed from a neutral vessel on the high seas.

" The object of their journey was to find another neutral asylum in which they might continue their operations against the interests of this country."

The *Trent* case was distinguished on the ground that at that time no agreement had been reached as to the claim put forward by certain countries to remove certain classes of individuals from a neutral ship, and that the status of Messrs. Slidell and Mason

[1] Special Supplement to the *American Journal of International Law*, Vol. 10 (1916), p. 428.

was entirely different from that of the individuals removed from the *China*. The removal of Messrs. Slidell and Mason—

" could only be justified on the ground that their representative character was sufficient to bring them within the class of persons whose removal from a neutral vessel was justified."

The distinction was drawn between such persons and—

" German agents whose object was to make use of the shelter of a neutral country in order to foment risings in British territory, to fit out ships for the purpose of preying on British commerce, and to organize outrages in the neutral country itself."

The United States Government were, however, not convinced by these arguments, and in a further note they maintained that the rule of international law was plain and definite that only military or naval persons may be removed from neutral vessels on the high seas. This rule had been expressly invoked by H.M. Government and followed by the United States in the *Trent* case.[1] Such being the rule, the only question was one of fact, namely whether those removed from the *China* were military or naval persons ; as to this the evidence in the possession of the Department of State showed :

" that the vessel is a regular mail steamer plying between China and the United States ; that it never postponed its sailing from time to time as alleged on account of the presence of British vessels in the offing ; that those who took passage thereon were not of military age or character ; that they were travelling on individual tickets to the United States, that is from one neutral country to another, and not as members of a military corps; that the vessel was not chartered for the particular purpose of their transportation, but that they were transported simply as passengers on an American steamer in the ordinary course of its passenger service."

Even if they were intriguing to foster rebellion in India and China, that fact could not make them *ipso facto* subject to seizure on an American vessel on the high seas. If they were intriguing in Chinese territory, the complaint of the British Government was clearly one to be laid before the Government of China, while as regards any violations of neutrality which they might be about to commit in the United States, the Government of the United States alone was responsible for any breaches of neutrality

[1] This was scarcely accurate, see pp. 67-9, above. In the *Trent* case neither the British Government nor Mr. Seward suggested the existence of a rule permitting the removal of military or naval persons, and Mr. Seward did not lay down an absolute rule against the removal of other persons.

committed or attempted in its territory and could not concede to a foreign Power the privilege of avoiding the possibility of such breaches by a wrongful interference with American vessels. In the opinion of the United States the *Trent* case and the present case were similar in every essential fact, as Messrs. Slidell and Mason, who were not in the military service of the Confederate Government, were bent on the violation of the neutrality of England by granting commissions and despatching commerce-destroyers from her ports. The United States, therefore, renewed its request for the release of the persons concerned.

With this request the British Government decided to comply. The note in which this decision was conveyed to the American Ambassador stated that it was desirable that this incident should not become a precedent for other cases in which the facts were not the same. After quoting the description of the circumstances given in the passage from the American note set out in the preceding paragraph, the note continued that it was not desired to raise hypothetical questions of other cases which might occur of the removal of enemy subjects from neutral vessels, but the Government thought it right to recite the statement of facts of the present case in order that the precedent might only be applied in the future to cases in which the facts were the same. Finally, after referring to the statement in the American note as to the sole responsibility of the United States Government for any breaches of neutrality committed in its territory, the British note suggested that the organized activity of enemy agents in the present war, their ubiquity, their ingenuity, the varied and extreme character of violations of neutrality perpetrated or planned by them, had made more difficult, more complicated and more invidious than ever before the responsibility of neutral Governments for breaches of neutrality committed or attempted in their territories. It was suggested that in view of the experience of the war, the American Government might find it not unreasonable to consider whether in future years there should not, by international agreement, be allowed some greater power in controlling the movements of enemy subjects across the seas, at any rate in cases where there was *prima facie* evidence of intention to use neutral territory to commit criminal or hostile acts.

After the despatch of this note, however, a new element entered into the case. The whole of the discussion hitherto had

proceeded on the footing that the persons concerned were not, in the words of the American note, "military or naval persons." It now transpired, however, that a considerable proportion of them were either regular officers, reserve officers or reservists. This fact was known to the British naval authorities who had effected the capture, but it was not known either to the British Government or the United States Government during the discussion of the case up to this point. On this fact becoming known in London, Sir E. Grey informed the American Ambassador that the British Government were releasing the civilians taken from the *China* but desired to submit this new information to the United States Government before taking any action with regard to the officers and seamen; as an unconditional promise had been given, the British Government felt that they could not go back upon it if the United States Government claimed that it should be carried out in the letter. The American Government, however, declined to waive their request for the release of all the persons seized, and they were released accordingly. It was, however, again pointed out to the United States Government that the promise of release had been given under the impression that none of the persons who were to be released were of military age or character. Had the real facts as to the status of many of them been known in London, the promise would never have been given. The United States Government subsequently demurred to this statement, but His Majesty's Government declined to depart from it.

In the light of the above facts and arguments, it is perhaps possible to indicate what the rule of international law, at any rate as understood by the American and British Governments, is as regards the removal of enemy persons from neutral ships on the high seas. It seems to be clear that the right to remove "military or naval persons" is admitted; it was never questioned, and was indeed implicitly admitted, by the United States Government in the discussion of the *China* case, and although the Declaration of London has no binding force, the fact that the removal of such persons was provided for in that instrument shows that the permissibility of such action had been gradually becoming recognized.

The result is to return to the rule laid down in the old treaties referred to above; assuming (rightly or wrongly) that this rule was superseded in consequence of the *Trent* case. Such a rule

is really in the interests of neutrals, for if removal is not permissible, a belligerent will be disposed, at any rate in cases of considerable importance, to bring the vessel in for adjudication, and in view of the expense caused by such action in the case of large passenger liners, the neutral will certainly prefer the removal of the enemy nationals to the alternative of the capture of the ship.

Whether the right of removal covers reservists returning to join the colours is perhaps not definitely settled; but no serious objection seems to have been taken during the recent war to the removal of reservists, and on general principles it would seem unreasonable not to regard them as " military persons " for this purpose. The only authority against it is the report of the Drafting Committee on the Declaration of London, and it should be remembered that the passage in that report which excluded reservists from the definition of " persons embodied in the armed forces of the enemy " related, not to Article 47, but to Article 45. It might clearly work injustice to neutrals if their ships were liable under Article 45 to condemnation in a case (which is possible, though perhaps not likely) where the shipowner was unaware of the character of the passengers; but this does not apply to action under Article 47, where the ship suffers nothing beyond the slight detention involved by the removal of the reservists. Further, the inclusion of reservists among the class of persons who may be removed seems more consistent with common sense. The question whether a particular individual is at the moment of seizure " embodied in the armed forces " of his country presumably depends on the terms of the military law of that country, but it seems entirely illogical, it being admitted that the object of his voyage is to take his place in the ranks, to make the right to remove him depend on whether the formalities necessary to that end had been completed at a consulate before he sailed or still remain to be carried out on arrival. Nor does it seem altogether logical that if the ship should happen to have on board uniforms or weapons for the use of the reservists concerned, those articles should be liable to capture while the men who are to use them must go free.

There remains the case of non-military enemy agents. If such persons are " of military age or character," the correspondence in the *China* case appears to indicate that their removal is legitimate, and it does not seem likely that such a contention would be seriously resisted; for if a belligerent nation decides

that particular individuals whom it could place in the ranks could be more usefully employed in activities which are not directly military, it does not seem reasonable that the right of the other belligerent to capture them should be lost in consequence of such a decision. As regards other agents, the case of the *China* will no doubt be quoted as an authority against the right to remove them. It remains to be seen whether in future the activities of enemy agents will be such that belligerents may find it necessary to claim, and neutral Powers find it reasonable to admit, the right which the United States Government successfully denied in the case of the *China*.

THE SOVIET GOVERNMENT AND RUSSIAN PROPERTY IN FOREIGN COUNTRIES

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THE *British Year Book of International Law*, 1921–2, contained an article concerning the judicial recognition of States and Governments, which dealt in part with the effect of the recognition of the Soviet Government by the British Government in the trade agreement of March 16, 1921. Following on that agreement, it was held by the Court of Appeal, reversing a decision of Roche J. in the case of *The Company for Mechanical Woodworking, A. M. Luther* v. *Sagor & Co.*,[1] that the acts of the Soviet Government must be treated by the courts of this country with all the respect due to the acts of duly recognized foreign sovereign States. Consequently a decree of the Government confiscating the property of corporations in Russia and the subsequent sale in Russia of that property by the Government were acts done by the *de facto* Government of a sovereign State, and must be accepted by the courts of this country as such. A person, therefore, who had bought from the Soviet Government in Russia a cargo of wood confiscated by the Government was held to have a good title in England against the claim of the previous Russian owner. The Lords Justices in the Court of Appeal rejected the argument that the decrees of the Russian Government could not be recognized in England because they were contrary to essential principles of justice and morality. The recognition of the *de facto* Government by the British Foreign Office involved the recognition of its right to legislate according to its own principles.

The proposition was thus stated by Scrutton L.J. :

" It appears a serious breach of international comity, if a State is recognized as a sovereign independent State, to postulate that its legislation is ' contrary to essential principles of justice and morality.' Such an allegation might well, with a susceptible foreign government, become a *casus belli* ; and should in my view be the action of the Sovereign through his ministers, and not of the

[1] 1921, 1 K.B. 456 and 1921, 3 K.B. 532.

judges in reference to a State which their Sovereign has recognized. The English Courts act on the rule ' that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms.' If it were, they must give effect to it, and they can hardly be more rigid in their dealings with foreign legislation. Individuals must contribute to the welfare of the State, and at present British citizens who may contribute to the State more than half their income in income tax and super-tax, and a large proportion of their capital in death duties, can hardly declare a foreign State immoral which considers (though we may think wrongly) that to vest individual property in the State as representing all the citizens is the best form of proprietary right. I do not feel able to come to the conclusion that the legislation of a State recognized by my Sovereign as an independent sovereign State is so contrary to moral principle that the judges ought not to recognize it."

The argument will be strengthened if the British Government adopts the proposal of a capital levy.

The view taken by the Court of Appeal follows the principle laid down by Lord Stowell in 1801 in adjudicating the case of a vessel which had been confiscated and disposed of by the Government of the Barbary States, where he remarked in upholding the action of that not very scrupulous Government, that : " although their notions of international justice differ from those which we entertain, we do not on that account venture to call in question their public acts." [1]

Legislation which is part of the revolutionary policy of a Government must be distinguished from penal legislation of a Government directed against individuals or any particular class. ' It is an accepted principle of international law as applied in England that the courts will not give effect to the penal laws of a foreign country which are " strictly local and affect nothing more than they can reach and can be seized by virtue of their authority." [2] In several cases British courts have refused to give effect to the legislation of a foreign country involving any departure from the established principles of law, where that legislation has been directed against a particular section of the community. The latest example was a decision with regard to the application of an ordinance passed in Germany during the war which cancelled the liability for interest on debts due from Germans to British subjects. The court refused to recognize the law as valid, on the ground that it was opposed to Article 23 (h) of the Hague Laws of War on Land as interpreted in Germany

[1] *The Helena*, 4 C. Rob. 3.

[2] *Folliott* v. *Ogden* (1789 1 H. Bl. 123) reversed on error (1790, 3 Term Rep. 725).

itself, and was not conformable to the usage of nations.[1] But where confiscatory legislation is part of a national policy and applies without discrimination to all persons within the jurisdiction, then, as soon as the State passing such laws is recognized as a *de facto* sovereign, the validity of its legislative acts will not be questioned by the courts in a foreign State.

A further step in the recognition of the revolutionary legislation of the Soviet Government was marked by the English courts in 1923 by the decisions given in the Court of Appeal in two cases concerning Russian Banking Companies : *The Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* and *Banque Internationale de Commerce de Petrograd* v. *Goukassow*.[2] In the first case the Russian bank, which had its head office in Petrograd and a branch office in London, deposited in 1914 through its London branch certain foreign bonds with a London bank to be held on account of a French bank for the benefit of the Russian bank. The Soviet Government, by various decrees and orders issued in 1918 and thereafter, nationalized banking in Russia by taking over the assets, share capital and management of all private banks and vesting them first in a State Bank, then in a People's Bank, and ultimately in a Government Department.

Subsequently, the manager of the London branch of the original Russian bank agreed to pay off the amount due to the French bank in return for the bonds and paid the sum due. The French bank then refused to release the bonds, and in an action brought in the name of the Russian bank by the manager of the London branch for the return of the bonds, it was held by Mr. Justice Sankey, whose decision was affirmed by Bankes and Scrutton L.JJ., that the Russian bank had ceased to exist in consequence of the decrees and orders of the Russian Republic, and that with its extinction the London branch could no longer be deemed a legal person, so that the manager had no capacity to sue.

Lord Justice Atkin, indeed, dissented from the majority of the Court of Appeal on the ground that the true effect of the decrees of the Russian Government was not to dissolve the bank, and that therefore a juristic person still existed which could sue.

[1] *Re Fried Krupp*, L.R. 1917, 2 Chancery 188.
[2] L.R. 1923, 2 K.B. 630 and 682.

Lord Justice Bankes in giving judgment stated :

" The all important question, as it appears to me, is whether or not the true effect of the Soviet legislation has been to destroy the Russian Commercial Bank as an entity or juridical person ; because, if it did, nothing that the local Manager said or did in this country could have preserved the existence of a branch in this country of a Russian Bank which had ceased to have any legal existence." [1]

This consequence follows from the English principle that a juristic person owes its legal personality to the law of the country in which it is incorporated, and the continuance of that personality depends upon the will of the State which created it. That principle was still more forcibly expressed in the second decision of the Court of Appeal concerning the present status of Russian banks having branches in foreign countries.

In that case the Russian bank had a branch in Paris ; and the defendant in the English action was a customer of the Paris branch, and under the terms of a contract made with that branch was largely indebted to it. The Soviet Government, although recognized in England, is not treated by the French Government as a *de facto* sovereign ; and the officials of the branch of the Russian bank who continued to carry on the business in Paris sued the defendant in England in the name of the bank to recover the amount of his debt. The court in this case unanimously held that, as according to the decision in the previous case the Russian bank had ceased to exist as a legal person, the action could not be maintained, notwithstanding that by the law of France, the country where the contract was made, the action would have been maintainable there. The law of the place of the contract, which was the French law, could not, it was held, be considered in the case, because by the *lex fori*, the English law, there was no person to sue.

It was argued in the Court of Appeal that :

" If a Company is dissolved by the Act of the State which gave it birth, it must be dissolved for all purposes. It cannot be that a Company incorporated in one country, with Branches in other countries, cannot be completely dissolved except by the laws of all the countries in which it carried on business. This is a question not of capacity to sue but of existence." [2]

Lord Justice Scrutton adopted this view, saying that :

" A non-existent person cannot sue. In the case of a natural person, the English Courts would decline to entertain an action in his name, and would not be interested in the fact, if it were so, that a foreign country allowed an action in

[1] At p. 637. [2] At p. 686.

the dead man's name for a year after his death. . . . So in the case of artificial persons, the existence of such a person depends on the law of the country under whose law it is incorporated, recognized in other countries by international comity, though its incorporation is not in accordance with their law. If the artificial person is destroyed in its country of origin, the country whose law creates it as a person, it appears to me it is destroyed everywhere as a person."

The Lord Justice distinguished the case from the decision of the House of Lords, with which the court was pressed, about the recognition of the French legislation of twenty years ago dissolving certain religious associations in France.[1] That case arose out of the action of the French Government which dissolved the order of Carthusian monks in France and confiscated to the State all their property in France. The liquidator appointed by the French Government claimed to be entitled to the trade-marks of the monks for their liqueurs in England; and the English court rejected the claim, holding, amongst other grounds, that the French law which was penal could not affect the property of the religious associations outside France. The order of Carthusian monks existed in a number of European countries; and the action in England was defended by members of the order who were protecting their English trade-marks. In the case of the Russian bank, however, said Lord Justice Bankes: "where the penal law has killed the person, I do not see how external Courts which recognize the law can help recognizing the death."

The Court of Appeal did not give in either appeal any decision as to the effect of the extinction of the Russian bank upon the disposition of the property of the branches of the bank in foreign countries. It was suggested by Lord Justice Atkin, in his judgment in the second case, that the property had either been transferred to the Soviet Government or become *bona vacantia*; but that point was not in issue. In favour of the view that the property in such circumstances becomes *bona vacantia*, there may be cited the decision of an English court with regard to movables situate in England which were the property of an Austrian subject who died domiciled in Austria without heirs.[2] There it was held that the property went to the Crown under English law, and not to the Austrian Treasury under Austrian law. That is to say, the court would not apply the Austrian law that took such property to the Austrian State, but

[1] *Lecouturier* v. *Rey*, L.R. 1910, A.C. 262.
[2] *Re Barnett's Trusts*, 1902, 1 Chancery 847.

treated the property as being in England without an owner, and therefore passing to the Crown.

It is interesting in passing to compare the decisions of the English courts with regard to the Russian banks and the judgments of the French courts in similar circumstances. It has been held in France, where, as noted above, the Soviet Government has not received any form of recognition, that Russian companies and societies which have removed to France continue to be governed by their old national law. The acts of the present Russian Government have no legal force in France, and the French courts therefore continue to apply the prior Russian legislation to such societies.[1]

We turn now to another aspect of the subject, the claim of the Soviet Government to the property of the former Russian Government abroad, on the ground that there has been a succession of the *de facto* Government. So far as the movable property of the former Russian Government in England is concerned, the trade agreement between His Majesty's Government and the Soviet Government made in March, 1921, provides as follows :

" The Russian Soviet Government undertakes to make no claim to dispose in any way of the funds or other property of the late Imperial and Provisional Russian Governments in the United Kingdom. The British Government gives a corresponding undertaking as regards British Government funds and property in Russia. This Article is not to prejudice the inclusion in the general Treaty referred to in the Preamble of any provision dealing with the subject of this Article.[2] Both parties agree to protect and not to transfer to any claimants pending the conclusion of the aforesaid Treaty any of the above funds or property which may be subject to their control."

From this clause of the agreement it appears that the right of succession of the Soviet Government to movable property of the former Russian Government in the United Kingdom has not yet been ceded. The matter is one left for future negotiation. It has been held, however, by the courts that part of the gold reserve of the former Russian Government deposited at the Bank of England could not be attached at the instance of Russian bondholders on account of their claims for interest.[3] Pending the final settlement of the question of succession of the Soviet Government,

[1] See *Vlasto* v. *Russo-Asiatic Bank* (Clunet : *Journal du Droit International*, 1923, p. 933).

[2] The general treaty referred to is one to be made between the Governments, by which their economic and political relations shall be definitely regulated in the future.

[3] *Marshall* v. *Grinbaum*, 1921, 37 *Times* L.R. 913.

Russian Government property in England must be treated as though it were the property of a sovereign State, and therefore not subject to the jurisdiction of the English courts.

That the legislation of the Soviet Government would not be effective to confiscate to the Government the movable property of Russian persons abroad is established not only by the general principles of international law with regard to the extent of sovereignty, but also by a decision of the English court given after the American War of Independence. In the case of *Barclay* v. *Russell* tried before Lord Eldon in 1793 [1] the court refused to recognize the right of the United States of America to certain property in England consisting of bank stock which had been purchased prior to the War of Independence by the Government of Maryland and which was held in the name of trustees in England. The court held that the right of the Maryland Government in its former condition had not passed to the new State of Maryland, and that legislation of the new State which was passed before the treaty of peace between the United States and England, and purported to discharge the old trustees, and to direct the transfer of the bank stock, was of no effect in England. Lord Eldon in his judgment declared that the United States had no right as an independent State to pass any such Acts. The newly formed Government may invest itself with all rights that it can command, but can go no further. It cannot by legislation affect property of its predecessor which is held abroad in the legal ownership of other persons. It was finally held in that case that, the specific execution of the trusts of the former Government in Maryland having become impossible, the right to dispose of the money was vested in the Crown.

On the strength of this decision, it would seem that if any property of the former Russian Government were vested in trustees in England on any trust, the Soviet Government would not be entitled to claim that property, but the Crown would have to dispose of it as *bona vacantia*.

With regard to immovable property of the Russian Government or of Russian societies, no question has yet come up in England; but a perplexing problem, involving questions both of the effect of Soviet legislation and of State succession, is promised in Palestine. Certain Russian religious corporations, in particular, the Orthodox Palestine Society and the Russian

[1] 3 Vesey Junior, 424.

Ecclesiastical Mission, owned before the war extensive properties in the Holy Land, and built a number of churches, religious hostels, and hospices in the holy cities and in the neighbourhood of holy sites. Local representatives of the societies in Palestine have continued to administer these properties since the war and claim that the societies' ownership is unimpaired. The Soviet Government, however, has claimed that, in virtue of a decree of the Council of the People's Commissaries of January 28, 1918, these Russian societies have been wound up, and their movable and immovable property recognized as the property of the Soviet State. The Government, therefore, declares that all the lands, hospitals and other buildings, and in general all other movable and immovable property of the said societies at Jerusalem, Nazareth, Haifa and Beirut and other places in Palestine or elsewhere, constitute the property of the Russian State. At the same time, they declare null and void all transactions which may have taken place in respect of such property without their consent and approval.

The Russian societies, although called Imperial, and normally having as their President a member of the Imperial family, were quite independent of the State; and the question which may have to be considered is the effect of these decrees of the Soviet Government in dissolving the societies. No legal action has yet been brought in the courts of Palestine either by or against the Russian societies, so that the question of their legal status has not yet come up for judicial determination. But sooner or later it will come up, and the recent decisions of the English Court of Appeal mentioned above may be considered relevant authorities.

It has been ingeniously represented that the Palestine Administration ought not to recognize the legislation of the Soviet Government which purports to dissolve the societies, because the Soviet Government is not recognized by the League of Nations, of which the Mandatory Government in Palestine is an emanation. That question opens up baffling vistas of disputes upon the abstract question of sovereignty. If the Mandatory Power recognizes the legal status of a foreign State, but the body from which it receives its mandate refuses to recognize that status, is the court in the mandated territory bound by the act of the Mandatory, which must be regarded by it as the sovereign, or can it look beyond the act of the Mandatory to the attitude of the Council of the League ?

However that may be, it is submitted that the claim of the Soviet Government to confiscate by decree all the movable and immovable property of the Russian societies in Palestine would not be accepted by any court. The legislation of a foreign State cannot by itself affect immovable property abroad and out of its jurisdiction, where that legislation is contrary to the principles of law or the public policy of the State in which the property is situate. It is one thing to say that the Russian societies are dissolved, and that therefore they cannot maintain actions with respect to their property in Palestine; it is another to say that their property in Palestine has passed by virtue of the foreign legislation to the Soviet State.

The question, however, is complicated, as legal problems regularly tend to be complicated in Palestine, because of peculiar conditions arising out of the vagaries of the Ottoman law. A number of the properties are registered in the land registers of the Government in the name of the Russian Government, and others in the name of Grand Dukes of the late Russian Royal House. Under the Ottoman law, until a year before the outbreak of the war, a foreign corporation could not hold land in its own name; but the Sultan could grant a firman authorizing a foreign sovereign or a foreign individual person to acquire land and be registered as owner. In this way, no doubt, the Russian Government and the Grand Duke obtained the legal title to land and buildings which they held on behalf of the religious societies. Other properties are registered in the names of individuals, some Russians, some Ottoman subjects, who likewise held them on trust, though no indication of the trust appears on the register. A law, passed by the Young Turks in 1913, did indeed provide that charitable institutions might own certain immovable property, and that the registration of property held on behalf of such bodies by nominees might be corrected. No action, however, had been taken by the Orthodox Society or the Ecclesiastical Mission under this law; and therefore the legal ownership remained in many cases in the Russian Government or their nominees.

Should the Soviet Government claim these lands and buildings as the successors of the registered owners, and not on the ground of the dissolution of the societies and the forfeiture of their property, a nice point will arise as to the validity of the equitable claim of the religious possessors against those who hold the legal

title. According to the general rule of international law which is laid down, for example, in the English cases of *United States* v. *Prioleau* [1] and *United States* v. *McRae* [2] a Government succeeds to the property of another Government subject to the same rights and obligations as if the former Government had not been displaced. It might, therefore, be urged that the Soviet Government would have to recognize the claim of the religious societies to the beneficial interest in the properties registered in the name of the previous Russian Government; but here again peculiar conditions of Ottoman law complicate the situation. The only law with regard to charitable endowments known to the Ottoman system was the Moslem law of "wakf," of which it is the fundamental principle that property which has been dedicated to a religious purpose is deemed to be dedicated to God and is rendered inalienable and taken out of disposition. Under the Ottoman régime wakf, however, could only be constituted before a Moslem Religious Court; and no other form of charitable endowment received recognition in law.

Several of the institutions of the Russian societies were indeed constituted wakf, and these would fall under the express provisions of the religious law which would prohibit their alienation to a secular purpose; but the properties registered in the name of the Russian Government have not been created wakf, and according to the letter of the Ottoman law no claim would have been admissible. There is nothing in the Ottoman Civil Code to correspond with the English doctrine of implied trust, although it would certainly be contrary to the spirit of the law to allow the diversion to secular purposes of property in fact, if not in legal form, dedicated for a religious purpose.

The position, however, is not unaffected by the granting of the Mandate for Palestine, because Article 13 of the Mandate provides that—

"all responsibility in connexion with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights . . . is assumed by the Mandatory, who will be responsible solely to the League of Nations in all matters connected therewith."

It would appear, therefore, that the Palestine Government is under an obligation to protect for religious purposes the religious buildings and hospices of the Russian societies; and if the

[1] 1886 35 L.J. Chancery 7.

[2] 1869 L.R. Equity 69.

present law is inadequate, it may have to introduce legislation to that end.

It is notable that the first case which was decided by an international Tribunal of Arbitration established under the Hague Convention of 1900 concerned the devolution of certain Pious Funds which were established in California. The funds were originally dedicated to the Jesuit Fathers and after their expulsion were administered by the Spanish Government, and subsequently devolved on the Mexican Government when Mexico obtained her independence. After Upper California was acquired by the United States, the Government of the United States claimed a part of the funds ; and an award was given by a British arbitrator in their favour. The international arbitration which took place under the Convention in 1902 dealt with a further claim of the United States Government against the Mexican Government with respect to the payment of interest on the fund.

The case of the Pious Funds affords an example of the international settlement of a dispute as to disposition of charitable endowments arising out of State succession. If no settlement of the claims of the Soviet Government to the properties of Russian charitable societies in Palestine should be brought about by diplomatic arrangement, it would seem meet that this precedent should be followed, and that the whole question of succession should be referred to the Permanent Court of International Justice, which could pronounce upon it with the *viva vox juris gentium*.

THE FREE CITY OF DANZIG

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THE Port of Danzig, situated at the mouth of the Vistula, provides Poland's only outlet to the sea.[1] Its population is of course predominantly German, and the Principal Allied and Associated Powers, in recasting the map of Europe after the World War, were, therefore, confronted with the problem of affording Poland access to the sea without unduly violating the principle of nationality. The German proposal was that Danzig should remain German territory but that it should be a free port in which Poland should have "far-reaching rights."[2] This proposal, however, was not acceptable to the Allies, and the solution to the problem was eventually suggested by Danzig's own history. The city had for centuries been a member of the Hansa League, the cities of which enjoyed complete autonomy, for any authority that the Emperor or neighbouring Princes could claim within their walls was an unsubstantial shadow. The League itself was a loose and ill-defined confederacy with a Diet which usually met at Lübeck, and whose assemblies were held "in the name of all the cities"; it does not appear to have possessed a formal constitution or a fixed mode of government. The binding link between the members was mutuality of commercial interests, and the cities were largely kept together by the fear of being "unhansed," i. e. being expelled from the League, a punishment which involved the loss at one blow of the delinquent city's commerce, as Bremen learnt to its cost in 1356.[3]

Although the League itself had virtually dissolved by the beginning of the seventeenth century, most of the individual

[1] The Polish Government has recently taken the preliminary steps with a view to building a seaport in Gdynia, a village in the extreme west corner of Danzig Bay, in the "Polish Corridor." It is intended that the new port should supersede, or at any rate supplement, Danzig as a harbour for Poland. (*The Times*, March 7, 1924.)

[2] Temperley: *History of the Peace Conference of Paris*, Vol. II, p. 292.

[3] Zimmern: *Hansa League*, pp. 83–5 and 201–8.

cities retained their autonomy. Danzig became a dependency of Poland in 1557, but its inhabitants enjoyed the right of self-government and retained their special privileges, with the result that the city continued to draw merchants from neighbouring German territory, and at the end of the seventeenth century its population was largely German.[1] Frederick II cast covetous eyes on it, but it was not till the partition of Poland in 1815 that it became incorporated in Prussian territory.

The Treaty of Peace with Germany once more gave Danzig the status of a Free City, but its sovereignty was limited by the fact that it was placed under the protection of the League of Nations, while Poland was given special rights and privileges in the conduct of Danzig's foreign relations and also within its territory, and yet a third body, the Danzig Port and Waterways Board, derogates from the territorial sovereignty of the Free City.

It is, therefore, proposed to examine Danzig's international status in the light of these limitations on her external and internal sovereignty.

I.—The League of Nations and Danzig.

Articles 100–8 of the Treaty of Peace with Germany deal with Danzig. By them the Principal Allied and Associated Powers undertook to establish the town of Danzig together with certain neighbouring territory defined in Article 100 as a Free City to be placed under the protection of the League of Nations, Germany renouncing all rights and titles over the territory concerned. A constitution was to be drawn up "by the duly appointed representatives of the Free City" in conjunction with a High Commissioner to be appointed by the League of Nations and was to be placed under the guarantee of the League of Nations. On the coming into force of the treaty, German nationals ordinarily resident in Danzig *ipso facto* lost their German nationality and became nationals of the Free City.

In March, 1920, the Council of the League appointed Sir Reginald Tower as High Commissioner, and instructed him to submit the constitution when it had been drafted for the approval of the Council of the League. The drafting proved to be a lengthy business and the draft was amended several times at the direction of the Council before the High Commissioner

[1] Dominian: *Frontiers of Language and Nationality in Europe*, p. 117.

was authorized to give his formal consent in May, 1922. Space does not permit dealing with the constitution,[1] save with those articles which concern the relations of the Free City with the League of Nations. Of these, Article 42 directs that the Danzig Senate—the highest authority in the territory—is to furnish to the League, on request, official information regarding the public affairs of the Free City ; Article 49 provides that no amendments to the constitution are to come into force without the previous approval of the League of Nations ; and Article 5 enacts that " the Free City of Danzig cannot, without the previous consent of the League of Nations, in each case : (1) serve as a military or naval base ; (2) erect fortifications ; (3) authorize the manufacture of munitions or war material in its territory." The Council of the League has already taken action under Article 5. Thus, in April, 1921, it refused the request of the President of the Danzig Senate for permission to manufacture 50,000 rifles for the Government of Peru in the small arms factory in Danzig,[2] and in July, 1921, the factory was definitely closed down, and all manufacture of arms (including fire-arms for sporting purposes) was forbidden. Even the transit and temporary storage of war material is prohibited, save with the previous consent of the League of Nations, and the High Commissioner has been declared by the Council to be the competent authority to declare what is, or what is not, " war material." In this respect the High Commissioner has not an easy task, as it is well known that international lawyers are not in agreement as to the definition of " war material." The Council has, however, recognized the right of Poland to import her own war material via Danzig, and has approved of the allocation of a special site in the territory of the Free City for the handling of such material.[3]

These restrictions placed on Danzig's power of defending herself in case of external aggression or of internal disorder have compelled the Council of the League to make provision for such contingencies. Accordingly the Council has declared that Poland is " specially fitted " to undertake the task of defending the Free City, but as a general rule the High Commissioner must ask for instructions from the Council before inviting Polish intervention.

[1] The constitution is set out in the *League of Nations Official Journal*, Special Supplement No. 7, 1922.

[2] *League of Nations Official Journal*, March-April, 1921, p. 160.

[3] *League of Nations Official Journal*, Special Supplement No. 5, 1921, p. 19.

Where, however, time does not permit of such action the High Commissioner may on his own authority invite Poland to ensure the defence of the Free City against actual or threatened aggression from a neighbouring Power; but in such case he must report to the Council of the League the reasons for his action. The Council has reserved the right of inviting one or more States to collaborate with Poland in any measures of defence.[1] No provision has been made for dealing with the situation which would arise if Poland refused the request of the High Commissioner, but presumably the Council could call on other neighbouring Powers.[2]

The Council has not considered it necessary to provide for the defence of Danzig by sea, but it asked the High Commissioner to examine the means of "providing in the port of Danzig without establishing there a naval base, for a port d'attache for Polish warships." The High Commissioner reported to the Council his difficulty in defining the term "port d'attache," and the question has been referred to the League's Permanent Advisory Committee for Military, Naval and Air Questions for its observations.

With regard to Article 103 in the Treaty of Peace with Germany providing that the constitution of the Free City "shall be placed under the guarantee of the League of Nations," Dr. Bisschop has suggested that: "it can hardly be surmised that such protection would be needed against Danzig's own inhabitants, as they were free to draw their constitution themselves. It seems more logical to conclude that such guarantee regards aggression from outside and usurpation of power on the part of the High Commissioner in contravention of his constitutional rights."[3] It is, however, a little difficult to accept this interpretation of the Article in the light of the activity displayed by the Council of the League in reviewing the various drafts of the constitution presented to them, and their insistence on certain amendments being carried out with a view to making the constitution more democratic. The guarantee appears to extend to attacks on the constitution not only from without but from within, and Article 49, which enacts that

[1] *League of Nations Official Journal*, Special Supplement No. 5, 1921, p. 16.

[2] See *Revue de droit international et de législation comparée*, 3rd Series, Vol. 2, p. 450; *Revue générale de droit international public*, 2nd Series, Vol. 3, p. 99.

[3] *The Saar Controversy*, p. 27.

amendments to the constitution require the approval of the League of Nations, seems to confirm this view. Nor does it appear that the guarantee was aimed against usurpation of authority by the High Commissioner. He has no powers of government in the Free City and his functions are entirely different from those of the Governing Commission of the Saar Basin; in fact on him rests the primary duty of guaranteeing the constitution as the servant of the League, which surely would not need to give specific guarantees against the acts of its own servant. It is much more likely that the guarantee in its external aspect is intended to protect the Free City against aggression on the part of Poland, Germany, or other neighbouring States.

But the duties of the High Commissioner are not confined to preserving the letter and the spirit of the constitution and securing the defence of the Free City; they also include arbitral functions in settling, in the first instance, differences between Poland and Danzig, and the successive High Commissioners have been kept busy in performing such functions. Sir Eric Drummond, Secretary General of the League, stated in a letter in April, 1921, that—

"The function of the High Commissioner is not only that of a judicial arbitrator between Poland and Danzig, but, I think, quite as well that of a peacemaker and a peacekeeper between these two States. The fact that one of the two Governments addresses itself to the High Commissioner in a controversial matter with the other Government would perhaps, as a general rule, be sufficient reason for the High Commissioner to accept the position as intermediary or mediator. On the other hand, the High Commissioner would, I should think, be fully entitled to refuse to deal with differences between the Free City and Poland which have not been formally submitted for him to decide, if he is of opinion that his intervention is unnecessary or undesirable." [1]

There is a right of appeal from any decision of the High Commissioner to the Council of the League, but any such appeal must be sent in writing to the High Commissioner within forty days dating from the day on which his decision was notified in writing to the representatives of both parties at Danzig.[2] It is worthy of note that in almost every case the Council has, on appeal, confirmed the decision of its High Commissioner.

[1] *League of Nations Official Journal*, July-August, 1921, p. 467.
[2] *Ibid.*, Special Supplement No. 5, 1921, p. 15.

II.—The Conduct of the Foreign Affairs of the Free City.

In the Treaty of Peace with Germany it was recognized that the conduct of Danzig's foreign affairs should be in the hands of Poland, and the principal Allied Powers undertook to negotiate a convention between the two States with that object. A convention was in fact signed on November 9, 1920,[1] and its second Article provides that Poland is to undertake the conduct of the foreign relations of the Free City and the protection of its nationals abroad on the same conditions as the protection of Polish nationals. In towns where Danzig has important economic interests one or more Danzig nationals are to be included on the staff of the Polish consulate to look after such interests, but to be responsible to the Polish Government.[2] Difficulties have since arisen because Polish consuls and diplomatic representatives abroad have not given protection or recognition to Danzig nationals unless they have been provided with Polish passports. To remedy this hardship the High Commissioner has recently ruled that such Danzig nationals holding passports issued by the Free City authorities shall be entitled to have them visaed by a Polish consul or diplomatic representative and thereupon to secure the recognition and protection accorded to Polish nationals.[3] The issue of exequaturs to foreign consular officers residing in Danzig is to be made by the Polish Government in agreement with the authorities of the Free City.[4]

Article I provides that a Polish diplomatic representative shall be stationed at Danzig, but otherwise the Free City has no power either to receive or to accredit diplomatic agents. The functions of the Polish representative in Danzig have been the subject of considerable dispute between the two States, but an amicable agreement was reached between them on August 23, 1922, whereby the competence of this official was definitely limited to acting as an intermediary between the two Governments.[5]

[1] *British and Foreign State Papers*, 1920, p. 965.

[2] Article III of the convention.

[3] *The Times*, February 5, 1924.

[4] Article IV of the convention.

[5] When foreign warships visit Danzig the first official visit of their commander is to be paid to the Senate of the Free City, but a further visit is to be paid to the Polish representative, who is moreover to conduct the diplomatic correspondence in connexion with such visits (*League of Nations Official Journal*, March 1923, p. 260).

An important aspect of the conduct of foreign affairs is, of course, the negotiation of treaties, which is dealt with in Article VI of the convention, providing that—

"Poland shall conclude no treaty or international agreement affecting the Free City without previous consultation with the Free City; the High Commissioner of the League of Nations shall be informed of the result of this consultation. The High Commissioner shall in all cases have the right to veto any treaty or international agreement, in so far as it applies to the Free City of Danzig, which in the opinion of the Council of the League of Nations is inconsistent with the provisions of the present treaty or with the status of the Free City."

This Article must be read in conjunction with Article 45 (f) of the Danzig constitution which enacts that legislation by the Danzig legislature is necessary for the conclusion of treaties with other States, subject to the proviso that: "this stipulation must not prejudice the stipulations providing for the conduct of the foreign relations of the Free City of Danzig by the Polish Government, in accordance with Article 104, paragraph 6, of the Treaty of Peace of Versailles."

The official interpretation of the united effect of these provisions is that no treaty is binding on the Free City until it has received legislative sanction, but that the Free City is not entitled to refuse to pass such legislation to give effect to treaties concluded on its behalf by Poland after prior consultation between them, unless the High Commissioner imposes his veto in accordance with his powers under Article VI of the convention with Poland;[1] such veto must be exercised, if at all, within a period of two weeks after the termination of the first session of the Council of the League at which the question could have been brought up for consideration, and in no case later than three months after the date on which the text of the treaty signed by the Polish Government has been notified to the High Commissioner in writing.[2] Two conventions have already been negotiated by Poland on behalf of the Free City—a transit convention with Germany and a provisional commercial and consular agreement with Norway—and in neither case did the High Commissioner impose his veto.

The Council of the League has also had under consideration

[1] See Viscount Ishii's report to the Council of the League. *League of Nation Official Journal*, March–April, 1921, pp. 163–4, 168–9. Cf. Piccioni in *Revue générale de droit international public*, 2nd Series, Vol. 3, p. 89.

[2] *League of Nations Official Journal*, Special Supplement No. 5, 1921, p. 16.

the question of the representation of the Free City at international conferences, and has approved of an agreement between Poland and Danzig, the effect of which is that the representative of the Free City at an international conference can act only with the knowledge and consent of the Polish delegate, of whose staff he should be a member; in the list of States represented the name of the Free City will be placed in its alphabetical order independently of that of Poland, whose duty it is to endeavour to secure an independent vote for the Free City; such vote, however, if accorded to the Free City, must actually be given by the Polish delegate. Any dispute concerning the application of this agreement is to be referred to the High Commissioner.[1]

The general principles governing the conduct by Poland of the Free City's foreign affairs were laid down in a decision of the High Commissioner dated December 17, 1921, which has received the approval of the Council of the League.[2] They may be summarized as follows:—

(*a*) If Danzig calls on Poland to conduct foreign relations in a matter clearly prejudicial to Polish interests, the latter may refuse such request.

(*b*) When called upon to conduct any foreign relations, Poland will either carry out the wishes of Danzig loyally and without delay, or will, within thirty days, give reasons for refusing, and will suggest what alternative or modification, if any, she would accept in order to meet the wishes of the Danzig Government.

(*c*) Poland may not impose on Danzig any foreign policy clearly opposed to the well-being and good government of the Free City.

(*d*) In every case there is a right of appeal to the High Commissioner in accordance with Article XXXIX of the Polish-Danzig convention of 1920.

It remains to mention that the Free City may not contract a foreign loan without previous consultation with the Polish Government, which must communicate its views within fifteen days. If Poland raises objections reference is to be made to the High Commissioner, who is to satisfy himself that the conditions of the proposed loan are not inconsistent with the convention of 1920 or with the status of the Free City.[3] In fact, Danzig has recently broken from the German paper mark and has issued a new currency backed by a sterling loan in London.

[1] *League of Nations Official Journal*, March, 1923, p. 258.
[2] *Ibid.*, June, 1922, p. 676.
[3] Article VII of the convention.

III.—The Status and Functions of the Danzig Port and Waterways Board.

It has already been pointed out that one of the main objects in constituting Danzig a Free City was to give Poland an outlet to the sea ; but to achieve this purpose effectively it was necessary to give Poland a voice in the control and administration of the Port of Danzig, of the Vistula, and of the railways from Poland in Danzig territory, without depriving the Free City of its vital interests in these undertakings. The solution of this problem adopted in the convention of 1920 was to create a body, to be known as the Danzig Port and Waterways Board, composed of an equal number—not to exceed five—of Polish and Danzig commissioners, to be chosen from representatives of the economic interests of the two countries, under the presidency of a person selected by agreement between the two Governments, or failing agreement, of a Swiss national to be appointed by the Council of the League.[1] Ultimately, in the absence of agreement the Council in April, 1921, appointed Colonel de Reynier, a Swiss subject, as President of the Board for three years at a salary of £2,000 per annum.

The Board exercises within the limits of the Free City the control, administration and exploitation of the port and waterways, of the railway system specially serving the port, and of all property employed in such exploitation. The onus of deciding what railways specially serve the port is left to the Board, with power to either State to appeal to the High Commissioner. All property connected with the exploitation of the port is transferred to the Board, which is also given power to lease or acquire such other property as it may require to fulfil its duties.

All dues, taxes and profits arising from this administration are to be collected by the Board, and when the expenses of upkeep and control have been paid the profits (or losses) are to be divided between the two States in a proportion to be fixed by a convention between them.

It is the duty of the Board to assure to Poland the free use and service of the port and means of communication with it as far as necessary for Polish imports and exports, to assure the free passage of emigrants from and to Poland and to assure

[1] Article XIX.

the development and improvement of the port and means of communication.[1]

The Board finally assumed its duties on June 1, 1921, when President Sahm on behalf of the Danzig Senate handed over to it the administration of the Pilot Office, Harbour Customs Office, Harbour Construction Office, Harbour Office, and the Vistula Construction Office. Moreover the High Commissioner subsequently decided that the administration of the whole of the Vistula within the territory of the Free City should be undertaken by the Board.

The question of the legal status of the President, commissioners and employees, was decided by agreement between the two States noted by the Council of the League. The President enjoys diplomatic privileges and immunities in the territories of both States, while the commissioners nominated by Poland enjoy such privileges only in Danzig territory, and the Danzig commissioners only in Polish territory. The status of the employees was left to be determined by the President of the Board in agreement with the two Governments.[2] Poland has recently complained that the Board is not achieving its primary purpose of promoting the development of the natural flow of trade from Poland to Danzig, and the Council has instructed the two States to enter into negotiations with a view to settling outstanding differences and developing the harbour, waterways and railways on progressive lines.

IV.—The Special Rights of Poland in Danzig Territory.

In order to give complete effect to Poland's right of access to the sea, it was not sufficient to create the Port and Waterways Board, because the Free City would not thereby be precluded from levying customs dues on goods in transit from Poland to the Port of Danzig. Accordingly Article XIII of the convention of 1920 provides that the Free City is to be included within the Polish customs frontier, the two countries forming one customs area under the Polish customs legislation and tariff. But the Free City for customs purposes forms one administrative unit under officials of the Free City, although subject to the Polish central customs administration, which has the right of inspection

[1] Articles XXIII–XXVIII.

[2] *League of Nations Official Journal*, February, 1923, p. 158.

in the Danzig area. The free zone existing in the port of Danzig is maintained and is placed under the administration of the Port and Waterways Board.

The convention also gives to Poland the right of establishing in the Port of Danzig a post, telegraph and telephone service "communicating directly with Poland," and also dealing with "postal and telegraphic communications via the port of Danzig between Poland and foreign countries," and the Free City has agreed to lease or sell to Poland the land and buildings necessary for the establishment of these services. All other postal, telegraphic and telephonic communications in the territory of the Free City as well as communications between Danzig and foreign countries remain under the control of the Free City.[1] In view of the fact that Poland has been allotted a site in Danzig territory for the handling and storage of munitions of war, the two States have agreed that Poland shall be entitled to maintain an armed guard to ensure the safety of the premises occupied, on the understanding that such premises do not possess exterritorial rights. The guard is not to carry arms or wear uniform outside the reserved area, and its strength is fixed by the High Commissioner in agreement with the Polish Government.[2]

The effect of these various arrangements is, of course, to establish a small army of Polish officials in Danzig territory, and it has been necessary to conclude a special agreement dealing with their legal status; this agreement provides that: "Polish authorities acting within their special sphere of competence, and Polish officials in the territory of the Free City, shall receive the same treatment as Danzig authorities and officials performing similar duties." They are to be responsible only to their Polish superiors for the performance of their duties, and if any Polish official is arrested by the Danzig authorities, the fact must be notified to one of the higher Polish officials. The agreement also provides that the Polish diplomatic representative in Danzig is entitled to appoint the head of the Polish postal and telegraphic services, and the head of the Polish customs in Danzig as members of his diplomatic staff, which means, of course, that these officials will be entitled to diplomatic privileges and immunities.[3]

With regard to Polish nationals generally in Danzig territory,

[1] Articles XXIX–XXXI.
[2] *League of Nations Official Journal*, Special Supplement No. 5, 1921, p. 17.
[3] *League of Nations Official Journal*, June, 1922, Part II, p. 678.

the Free City has agreed not to discriminate against them, and to apply to racial, religious and linguistic minorities provisions similar to those applied by Poland in Polish territories.

But, subject to what has been said, the authorities of the Free City have complete control over foreigners in its territory, and it has been held by the Council of the League that the Polish visa is not necessary to enable foreigners to enter the Free City.

V.—Conclusion.

The foregoing considerations seem to suggest that a real attempt has been made to reconcile the autonomy of the Free City with the protection of Poland's " right of way " to the sea. But how far can the Free City be said to possess a status in international law ?

M. de Lannoy[1] has compared her position with that of the Republic of Cracow, which in 1815 was declared a sovereign State and placed under an " international commission " composed of a representative of Austria, Prussia and Russia. He points out, however, that Cracow's claim to an international status was stronger, in that it was neutralized and enjoyed a theoretical right of legation which has been denied to Danzig. On the other hand, there is one vital difference between them. At Cracow each of the protecting Powers had its own représentative whose essential duty it was to defend the interests not of the Republic but of the State that had nominated him. Accordingly the commission at Cracow was guided in its conduct by considerations to which the High Commissioner at Danzig is a stranger.

M. Clunet says[2] " d'après le traité de Versailles, qui l'a créée, la ' Ville Libre ' de Danzig n'est pas, pour la Pologne, un État voisin quelconque, neutre et indifférent, mais un véritable ' second,' et même un associé *sui generis*, au moins dans la vie internationale."

The truth is that political institutions cannot always be made to fit in with preconceived legal theories, and Danzig's international status is certainly *sui generis* ; it is the result of a bold experiment in international government which has only been made possible by the institution of the League of Nations.

[1] *Revue de droit international et de législation comparée*, 3rd series, Vol. 2, p. 450.
[2] *Journal de droit international*, 1920, p. 483.

While the Free City appears to possess none of the external attributes of a sovereign State, it seems impossible to deny her some international status in view of her relations to the League. It is true that her foreign affairs are exclusively conducted by Poland, but ample security has been provided for the protection of her vital interests through the agency of the High Commissioner. It is inevitable that in the initial stages of the complicated régime that has been instituted frequent disputes should arise between the two States, especially in view of the bitterness that has long existed between the Polish and German nations, but with the passing of time the mutual benefit resulting from co-operation should render such disputes of less frequent occurrence. As is pointed out in the report of the Council to the Fourth Assembly of the League :

" Formally, most of the Danzig questions before the Council have had the character of disputes between Poland and the Free City, but it should be understood that the great number of such disputes is due to a practical desire to obtain a closer definition of many of the Treaty stipulations. In other words, the settlement of a great many of the Danzig-Polish differences is of a constructive character, aiming at the laying down of the foundation of stable conditions in the future." [1]

The presence of the High Commissioner enables an aggrieved party to put its case at once before an impartial tribunal and so decreases the danger attendant on unredressed grievances. The creation of the office of High Commissioner was a happy inspiration on the part of the Principal Allied and Associated Powers and has borne far better results than the administration of the Saar Basin by an international commission responsible to the League ; this is due partly to the fact that the High Commissioner is free from governmental functions and partly to the fact that he can act quickly and effectively without the necessity of referring to colleagues of differing aims and ideals. It is a remarkable tribute to the fairness and political perspicacity of those who have already held the office that almost all their decisions have been confirmed on appeal by the Council of the League. There is no reason why the Council should not be equally fortunate in its future appointments.

Is not the institution of the office of High Commissioner a precedent which might well be followed in the case of man-

[1] *Report to the Fourth Assembly of the League on the Work of the Council*, &c. (A. 10, 1923), p. 39.

dated territories ? When such territories reach such a stage of development and civilization as enables them to stand alone " subject to administrative advice and assistance," why should not such advice and assistance be given by a High Commissioner of the League of Nations ? Such an arrangement would at any rate have the advantage of getting rid of the inevitable suspicion that mandated territories are administered for the benefit of the Mandatory Power concerned and not solely as " a sacred trust of civilization."

THE MONROE DOCTRINE[1]

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On December 2, 1823, President Monroe, the fifth President of the United States, addressed to Congress a message which for a hundred years has formed the very bed-rock of the foreign policy of that great Republic. Few pronouncements have received so much attention from statesmen and writers. The literature on the subject would fill scores of yards of shelf-space. The message has been so often cited, appropriately and inappropriately, by Presidents and Secretaries of State in varying terms and under varying circumstances, that it becomes necessary to go back to the texts to ascertain the meaning-and appreciate the circumstance of the original message.

It is right that we should endeavour at this time, on the occasion of the hundredth Anniversary of the Monroe message, to understand it, for one part of it was prepared after communications had passed between the American and the British Governments, though the two Governments have by no means always been in agreement as to its application. The doctrine laid down has exercised a profound influence not only in the hemisphere to which it originally applied but over a far wider area. For a century it has kept the New World free from attempts to impose on it the political system of the Old, and although the past century has by no means been a century of peace in the whole of the Western Hemisphere, there can be no doubt that the maintenance of the principles enunciated has been justified by the result.

With these preliminary remarks it is necessary to turn back to the year 1823 and see what President Monroe actually said, to consider the circumstances which led him to make so momentous and so far-reaching a pronouncement, and then to examine some of the constructions subsequently put upon it.

[1] A lecture delivered before the University of Cambridge, December 3, 1923.

There are two declarations of policy contained in President Monroe's message of December 2, 1823, separated widely in the order of the message as well as by the circumstances which gave rise to them. These have often been combined as if they were one, but they must be kept separate and distinct as dealing with separate and distinct situations. These two declarations enshrine two principles which may be described as (*a*) non-colonization, and (*b*) non-intervention. The whole of the message relating to these points is not cited, but the following are the essential paragraphs :

(*a*) " The occasion," said Monroe, " has been judged proper for asserting, as a principle *in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European Powers.*" [1]

This is the non-colonization principle.

(*b*) " *In the wars of the European Powers, in matters relating to themselves, we have never taken any part, nor does it comport with our policy so to do.* It is only when our rights are invaded or seriously menaced that we resent injuries or make preparation for our defence. With the movements in this hemisphere we are of necessity more immediately connected, and by causes which must be obvious to all enlightened and impartial observers . . . We owe it, therefore, to candour and to the amicable relations existing between the United States and those Powers to declare that *we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety.* With the existing colonies or dependencies of any European Power we have not interfered and shall not interfere. But with the Governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, *we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European Power, in any other light than as the manifestation of an unfriendly disposition towards the United States* . .

It is impossible that the allied Powers should extend their political system to any portion of either continent without endangering our peace and happiness ; nor can any one believe that our southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition in any form with indifference." [2]

This is the non-intervention principle, but as will be seen, in the policies of some administrations the two principles have tended to merge into each other.

[1] § 7 of the message.
[2] §§ 48 and 49 of the messsge.

I

The circumstances giving rise to the two separate pronouncements were different in their character. The reasons which led to the non-colonization doctrine were several, but it was primarily an order of the Tsar of 1821 which brought the question into prominence. The only Powers in North America in 1823 other than the United States were Great Britain and Russia, the latter Power having the sovereignty of Alaska. The Tsar by an ukase of September 4, 1821, had asserted exclusive territorial right from the extreme northern limit of the continent to the fifty-first parallel of latitude.

By a treaty of 1818 between Great Britain and the United States these two Powers had agreed to a joint occupation for ten years of all the country that might be claimed by either on the north-west coast, westward of the Rocky Mountains, without prejudice to the rights of either party. These rights it was realized would turn on questions of discovery, occupation and settlement, and it was to guard against such claims on the part of Russia that this part of the doctrine was founded. Early in the summer of 1823 John Quincy Adams, in a letter to Mr. Rush, United States Minister in London, propounded the principle that the entire continent was closed against the establishment by any European Power of any of the colonial systems which had restricted commerce, navigation, trade and fishing. Mr. Rush was not successful in obtaining the assent of Great Britain, the Government of which denied the correctness of the facts, especially the statement that the whole of the continents were occupied by civilized nations and that they would be accessible to Europeans and each other on that footing alone. Great Britain considered the whole of the unoccupied parts of America as being open to her future settlement as before, that is by priority of discovery and occupation. These instructions of J. Q. Adams were the germ of this portion of Monroe's message. As Dana says of this part of the message: "the question presented was one of political geography." [1] It was accepted neither by Great Britain nor by Russia, neither can it, in my opinion, be justified by the facts of the case, that is as facts of political

[1] Dana's note in his edition of Wheaton's *International Law* (1866), pp. 97–112, is one of the most valuable expositions of the subject, and has been of much assistance in the preparation of this paper.

geography. But what it did here was similar to what it did in the non-intervention portion. It gave notice to the world that there was to be no " scramble " for the Americas, North, Central or South. Future colonization would be viewed as a menace to the United States and would involve their rights and interests. In the second part of the message it is intimated that there is no intention to interfere with existing colonies. It is true that the words of the message refer to the " free and independent " condition which the continents had assumed, which was certainly open to question, but the essence of this part of the message is the same as that of the other part, viz. the protection of the interests of the United States. It also did more ; it made for peace in the whole hemisphere. " Colonization " only is referred to, and Mr. Calhoun, who was a member of Monroe's Cabinet, stated in 1848 that this portion of the message was never before the Cabinet, that the statement regarding the continents having asserted and maintained their freedom was inaccurate, and that it gave such offence to England, with whom the United States was acting in the other portion of the message, that she refused to co-operate in settling the Russian difficulty.

The meaning of the non-colonization principle soon came into question. At first, in 1825 and 1826, President Adams announced that it was for each State to defend its own territories. For the moment the United States seemed afraid of the magnitude of its task, and Mexico was told that the Government of each State must see to the enforcement of the non-colonization principle. This is in accord with its principle : there is no reason why each State should not announce a Monroe doctrine for itself. It cannot be a Pan-American doctrine.

But with President Polk came an extensive interpretation. The Monroe doctrine was invoked to assist the United States in the annexation of Texas and to warn off European Powers from intervening, and in his message of December 2, 1845, while purporting to reiterate the Monroe doctrine against colonization, the President proceeded to extend it to the acquisition of any dominion by any European Power without the consent of the United States. This, in effect, was a prohibition of transfer by any means by any European Power of any of its colonies to any other European Power without United States sanction. In 1848 Polk took the further step, in regard to the possible transfer of Yucatan to a European Power, of declaring that it could in no

event be permitted. With the internal politics of the United States which led to this attitude we cannot deal; already in 1848 there were the rumblings of the coming storm which was to break in 1861 on the question of slavery. Polk's doctrine was reiterated by President U. S. Grant in 1870, when it was rumoured that Italy was in negotiation with Sweden for the transfer of the island of St. Bartholomew. In the previous year President Grant had stated in his annual message that the dependencies of Spain were no longer regarded as the subject of the transfer from one European Power to another: "When the present relation of colonies ceases they are to become independent Powers, exercising the right of choice and of self-control in the determination of their future condition and relations with other Powers."

This idea of preventing colonization on the American continent received still further expansion in the matter of Magdalena Bay. An American company had secured from Mexico rights over a tract of land surrounding Magdalena Bay in Lower California. The venture was unsuccessful and the mortgagee foreclosed and was in negotiation for the sale to some Japanese private purchasers. But before concluding the bargain he consulted the United States State Department. This was unfavourable, and the matter was brought before the Senate. On August 2, 1912, that body, on the proposition of Mr. Lodge, passed a resolution:

"That when any harbour or other place in the American Continent is so situated that the occupation thereof for naval or military purposes might threaten the communications or safety of the United States, the Government of the United States could not see without great concern the possession of such harbour or other place by any corporation or association which has such a relation to another Government not American as to give that Government practical power of control for national purposes." [1]

As an abstract proposition based upon the principle of self-defence there is a good deal to be said for the doctrine embodied in the resolution, but as applied to the facts it appears to be strained. This resolution purported to be based on the doctrine of self-defence, of which a State must be allowed to judge. There is no need in such a case for the Monroe doctrine. Opinions may differ as to the merits of the case, but the basis relied on is a universally accepted principle.

[1] *American Journal of International Law*, Vol. 6 (1912), p. 937

In the previous year (1911) President Roosevelt had added a corollary, as it has been called, to the Monroe doctrine, by holding that whenever it was necessary to throw a South American State into the hands of the receivers, it was necessary for the United States to act as receiver. If a foreign Power came in it might lead to territorial acquisition, and so the United States claimed to keep such foreign creditors out as a legitimate extension of the Monroe doctrine.

President Wilson carried this extension yet further in his famous Mobile speech on October 27, 1913, when he protested against certain concessions which Colombia had made or was proposing to make to a British syndicate. He said the time had come when South American States must stop making such concessions, because foreign interests might dominate the internal affairs of States granting them. The negotiations in question were broken off, whether *propter hoc* or merely *post hoc*, I do not say. And in September, 1919, President Wilson increased the vagueness of the doctrine by saying that "the United States means to play big brother to the Western Hemisphere in any circumstances where it thinks it wise to play big brother." [1]

By a long series of extensions beginning with that of President Polk a position has been reached whereby the doctrine of the non-colonization principle has become hardly distinguishable from the non-intervention principle. But the application of these principles has been by no means uniform, and this is to be expected, bearing in mind what the doctrine is, namely a statement of policy. What one administration considered to be an infringement another did not. Thus Great Britain occupied the Falkland Islands in 1833 and the United States declined to accede to the Argentine's view that this was a violation of the doctrine. The making of the Clayton-Bulwer Treaty in 1850 was scarcely in accord with the doctrine, though subsequently on the ground of its being a violation of the Monroe doctrine the United States declined arbitration on points arising out of it. Yet the United States left the final determination of the Oregon boundary to a European monarch, but intervened to take the side of Venezuela in the dispute with Great Britain over the boundary question. At one time the transfer of the island of St. Bartholomew from Sweden to a foreign Power was, as we have seen, viewed as a violation of the principle, but later no

[1] *Ibid.*, Vol. 14 (1920), p. 207.

opposition was raised when, in 1877, Sweden transferred it to France. It would appear that to-day this part of the message has been interpreted to mean that the United States asserts a right to oppose the acquisition of any control over any part of the American continent by any non-American Power, by any means whatever, and even to protest against grants to non-American citizens of any concessions which might ultimately lead to intervention by a non-American State to enforce the claims of its nationals. But it does not follow that the claim will always, in all circumstances, be advanced. Political expediency is the guide, and expediency here means the resultant of varying forces based on, or deemed by popular opinion to be based on, the principle of self-defence. Mr. Root has put it thus :

" Undoubtedly as one passes to the south and the distance from the Caribbean increases, the necessity of maintaining the rule of Monroe becomes less immediate and apparent. But who is competent to draw the line ? Who will say ' to this point the rule of Monroe shall apply : beyond this point it should not ' ? " [1]

The answer clearly is that no one can settle these points before a case arises.

II

The non-intervention doctrine falls into two parts : (*a*) non-intervention of the United States in European affairs ; (*b*) non-intervention of European States in American affairs.

The doctrine of non-intervention of the United States in European affairs had already been laid down by Washington in 1796 and emphasized by Jefferson. As propounded by Monroe it is not an absolute doctrine of non-intervention, but it was, with few exceptions, steadfastly observed until the closing years of the nineteenth century. The possibility of American rights being invaded led to the participation of the United States in the Conferences of Berlin and Brussels to settle the difficult questions raised in the scramble for Africa, and again the United States took part in the Conference of Algeciras in 1906 over Morocco. The work of the United States delegation at both of the Hague Peace Conferences is too well known to call for any further comment.

The New World has twice in the century been called in to redress the balance of the Old, but the second time it entered

[1] *Proceedings of the American Society of International Law*, 1914, p. 20.

voluntarily. It was no violation of the Monroe doctrine when the United States entered the conflict raging in 1917, for American rights had been invaded and seriously menaced, and in accordance with Monroe's doctrine the time had come for the United States to resent injuries and prepare for defence. Slowly but surely there entered the minds of the American people the knowledge that, quite apart from any other reasons, and there were potent ones, the history of German policy in the New World showed there was danger ahead. The longing eyes of the German statesmen were cast on the great unpeopled spaces of the rich South American continent, and these desires could not be satisfied till the Monroe doctrine had been blown to atoms by a successful war. The declaration of war by the United States against Germany in April 1917 was in an important sense an intervention in defence of the doctrine. Of the abstention of the United States from participation in the League of Nations there is not space to speak in detail. To attempt to do so in a few words would be to do injustice both to President Wilson and to his opponents. The United States is still opposed to alliances and this must account for the refusal to accept the Anglo-American-French treaty of guarantee, a refusal which has cost Europe much.

But having taken the step of non-ratification of the Treaty of Versailles with the League of Nations Covenant, and of the French guarantee treaty, the American Government still reserves to itself the right to act in European affairs when its co-operation can be the means of advancing peaee and the re-establishment of sound economic conditions. Fortunately for millions of starving and homeless people in Europe, the Monroe doctrine of non-intervention in Europe has not applied to the generous hearts and purses of the American people.

The principle of non-intervention of European States in American affairs was enunciated with the goodwill and approval of Great Britain under the following circumstances.

The Holy Alliance had been formed in Europe after the close of the Napoleonic wars. Russia, Prussia, Austria and France had intervened in several European countries to put down movements for free constitutions. In 1823 France invaded Spain to suppress the constitutional Government of the Cortes and to restore Ferdinand VII. French intervention was successful and there were signs that the Holy Alliance intended to assist Ferdinand to recover his lost possessions in Central and South

America. The intervention of France in Spain was particularly hateful to Great Britain, who, only some ten years previously, had by brilliant victories driven the French forces from the Peninsula. France, as a way of undermining English influence with the United States, hinted that England had designs of her own on Cuba, then torn asunder by civil war. At this juncture Mr. Rush, the United States Minister in London, informed Canning that the United States could not view with equanimity the possession of Cuba by any European State other than Spain, and informed him of the rumours which had reached the United States. Canning at once disclaimed any intention to interfere in Cuba, and added that he could not view the passing of Cuba into the hands of either France or the United States with indifference. He proposed an agreement on this head with France and the United States which the latter Government left to him to arrange. Canning, too, was averse from the intervention of France or of any European Power on behalf of Spain's revolted colonies. He was not, as yet, prepared to recognize their independence, and he proposed to Mr. Rush a joint declaration with the United States that they had no aim to possess any portion of the Spanish colonies for themselves, but that they could not view with indifference the intervention of any foreign Powers. The joint declaration was never made, but before making a pronouncement Monroe took the opportunity of consulting Mr. Jefferson—who was then in retirement—on the subject of Canning's proposal. His reply was an elaborate letter of October 24, 1823, the original of which, as I learn from a telegram which appeared in *The Times* on October 29, 1923, has just been brought to light. This letter, which is of great interest for us to-day, contains the following sentences :

"Our first and fundamental maxim should be never to entangle ourselves in the broils of Europe ; our second never to suffer Europe to intermeddle with cis-Atlantic affairs. America, North and South, has a set of interests distinct from those of Europe, and peculiarly her own. She should therefore have a system of her own, separate and apart from that of Europe. One nation most of all could disturb us in this pursuit ; she now offers to lead, aid and accompany us in it. Great Britain is the nation which can do us the most harm of any one or all on earth, and with her on our side we need not fear the whole world. With her, then, we should most sedulously cherish cordial friendship, and nothing would tend more to knit our affections than to be found fighting once more side by side in the same cause."

When we remember that less than ten years before this the two

countries had been at war, this statement is the more remarkable. Jefferson agreed to the proposed declaration and sent a draft of the words to be used, but this draft was not accepted, and Monroe's declaration, under the strong influence of John Quincy Adams, took a different form, much more lengthy but less minatory. Jefferson had suggested that the President should say—

" that we aim not at the acquisition of any of those possessions ; that we will not stand in the way of any amicable arrangement between the colonies and their mother country ; that we will oppose with all our means the forcible interposition of any other Power as auxiliary, stipendiary, or under any other form or pretext, and most especially their transfer to any Power by conquest, cession or acquisition in any other way." [1]

Monroe used the less aggressive form of saying that the United States would consider any attempt on the part of foreign Powers to extend their system to any portion of the hemisphere as dangerous to the " peace and safety " of the United States and further that it was impossible for them to behold European interposition in any form with indifference. There is no indication of the steps the United States would take should any European Power intervene. Monroe's message on this subject was received by English statesmen with great satisfaction. It strengthened Canning's hands in his negotiations with France ; it put an end to further schemes of the Holy Alliance to interfere in America. The message drew from Sir James Mackintosh the eulogy that—

" This coincidence of the two great English commonwealths (for so I delight to call them ; and I heartily pray that they may be for ever united in the cause of justice and liberty) cannot be contemplated without the utmost pleasure by every enlightened citizen of the earth."

This part of the Monroe doctrine has, like the other, been the subject of expansion, and President Polk's tenure of office is again the starting-point. At first, in 1845, he spoke of it in terms applicable only to North America, but later, in 1848, he declared it applicable to Central America. The original doctrine spoke of intervention for the purpose of " oppressing or controlling " the destinies of the States of America, but Secretary Blaine in 1881 stated that by virtue of the Monroe doctrine no European State could be allowed to exploit or construct or finance any transcontinental canal. In the Venezuela boundary

[1] Dana's note to Wheaton's *International Law*, p. 107.

discussion the United States relied on and quoted Monroe's message, and claimed a right to protect Venezuela against the claims being advanced by Great Britain in regard to the disputed boundary between British Guiana and Venezuela. Of the despatches of Secretary Olney on the Venezuela boundary question it is as well, perhaps, to say little now. His claim, in a restatement of the Monroe doctrine in his correspondence with Lord Salisbury, put the United States in the position of supreme arbiter in the affairs of the whole of the American continent. In an extraordinary spirit of Caesarism he wrote : " To-day the United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition." [1] Lord Salisbury's reply was a refusal to accept the Monroe doctrine in this sense, or as being applicable to the question, and he showed that the circumstances of the controversy had very few features in common with those prevailing in 1823.

III

Anything like a detailed examination of the applications of the Monroe doctrine in its original or extended meaning in the century which has just closed since it was first promulgated would involve a very large portion of the diplomatic history of the United States. It is only possible to take a rapid survey and to endeavour to reach some conclusions.

All that is claimed in the Covenant of the League of Nations is that the Monroe doctrine is a " regional understanding " (that is the curiously ambiguous phrase) which makes for the maintenance of peace. On the whole I believe the claim is justified if we limit the expression somewhat. The message enunciated a policy which in the opinion of the President should be the guide of American statesmen. It is one of the remarkable things about the Monroe doctrine that it is no part of the law of the United States ; it has never been promulgated by Act of Congress or Resolutions of Congress, though Congress has recognized it often. It is in no sense legally binding on any Government, but it has been reaffirmed time after time and applied by successive Ministries according to their perception of the national requirements. By its reiterated assertion the American continents have been preserved from any attempts on the part of non-American

[1] J. B. Moore : *Digest of International Law*, Vol. VI, p. 553.

Powers to acquire forcible possession of any part of the territories, or to introduce the political schemes of European statesmen.

This doctrine, whether in its original or in its expanded form, is not a doctrine of American altruism. As Senator Lodge has concisely put it, and Mr. Root in a more detailed manner: "The Monroe doctrine rests primarily on the great law of self-preservation." British statesmen had enunciated a doctrine not dissimilar in regard to India, and have brought within its scope countries as near and as far as Afghanistan, the Shan States, Persia and Egypt. The problem of the Pacific raises similar questions. The first century of the Monroe doctrine has witnessed an immense expansion of the territory of the United States and the methods employed have by no means always been such as present-day writers can justify. Few States with widely extended territories have a perfectly clean record in this respect. The Monroe doctrine has been invoked more than once in this expansion, and Mr. Bushnell Hart in a recent work has drawn attention to "the contrast between the principle that foreign nations must not annex American territory and the equally well-established principle that the United States may annex what she pleases." [1]

If the States of Europe have sometimes taken umbrage at the manner in, and occasions on which, the Monroe doctrine has been asserted, the States of South America have often been no less antagonized. And yet some of them have, by its invocation, been more than once saved from the just punishment of their breaches of international law, and their very existence is, in no small measure, due to its enunciation. Some of the more backward have been prevented in the past from reforming their international manners in a way which would have brought them into line with more advanced States. The Big Brother has sometimes done them harm by preventing them from getting a wholesome spanking. The leading States of South America, Argentina, Brazil and Chile have in modern times, by the mouths of highly esteemed writers and statesmen, protested against the assertion of the Monroe doctrine as a suggestion of the primacy of the United States on the American continent. President Polk's statement that "we have withdrawn the rights to conquer colonies and intervene from European States, but we have reserved them to ourselves to exercise without respecting the

[1] *The Monroe Doctrine*, p. 368.

other States of the New World " has rankled in the memories of many of the States, especially as they have seen certain evidence of this from time to time in Central America. The policy of the United States in regard to the South American States has undergone an important change in recent times. President Roosevelt's famous message to Congress on December 5, 1905, recognized that there had been much suspicion engendered in certain of the southern republics lest the United States should interpret the Monroe doctrine as inimical to their interests. He declared that the doctrine must never be used in any way to further the aggrandizement of the United States at the expense of the southern republics, but he warned some of them that the United States would not permit them to use the Monroe doctrine to shield them against the consequences of their misdeeds—a necessary warning. But in order to prevent foreign Governments from territorial occupation with a view to the collection of their lawful debts, he put forward the view that the United States must themselves undertake such arrangements as would ensure such debts as were really just being collected. This can be done quite apart from the Monroe doctrine by the use of the good offices or mediation of the United States. The more recent attitude of the United States to the smaller Latin republics has been generally characterized by the principle which Roosevelt propounded, and on the whole it has made for the benefit of these defaulting States as well as for that of their creditors.

The South American States remain, however, suspicious of the Monroe doctrine, the " definition, interpretation and application " of which is in the hands of the Washington Government. Twice within six months in 1923, Mr. Secretary Hughes emphasized the view that the Monroe doctrine is no infringement of the sovereignty of other American States, who have become Members of the League of Nations and who appear to prefer to rely on the Covenant. There seems to be no contradiction between such membership and Pan-Americanism, but in the latter the South American States appear to see looming too close the great power of the United States, making against the equality of States as some of the South American lawyers and statesmen interpret that doctrine. But things are what they are.

The doctrine of Monroe was the enunciation of a principle of policy, and is not an obligation of international law. The whole of the American continent is certainly now no longer open to

colonization—whatever may have been the position in 1823—and in its literal sense this portion of the message no longer has any application. It is in the interest of the peace of the world that no part of the continent should be made the object of intervention or domination by any foreign Power, whether European or Asiatic. On the other hand, attempts to limit the free play of economic forces in the republics of South America such as have been sometimes suggested will be met by the assertion by non-American States of a right to equality of opportunity and treatment there; and to invoke the Monroe doctrine to prevent capital from flowing freely into all parts of these countries, the richest in natural resources of all the world, would provoke opposition and be a misreading of the principle of self-preservation, the basic doctrine of the non-intervention section of Monroe's message. The United States have introduced and asserted a policy of the " Open Door " in other parts of the world; they cannot refuse to recognize it on the American continent.

It is frequently pointed out by some of the more thoughtful American statesmen and publicists that it is an error to speak of certain extensions of the Monroe doctrine by Presidents and Secretaries of State under the pressure of great popular movements as being applications of that doctrine. It is well that this should be done, but from the very nature of a political doctrine such as that which we are considering, interpretations of it must vary from time to time. The doctrine, from its elastic interpretations, has been described by a South American President as a " gutta percha " doctrine. Many acts which have been done in its name might have been justified on other principles provided by the rules of international law, and there was often no need to relate them to the Monroe doctrine. But when a political movement is taking place and the people are under the stress of a mass-emotion the use of the phrase " the Monroe doctrine " becomes a far simpler means of supporting a policy than the use of more involved expressions of greater accuracy taken from the texts of books on international law. It becomes a useful slogan for the politician who knows the value of catchwords, whether it be " the Monroe doctrine," " Self-determination " or " Your food will cost you more." And it is largely for this reason that American politicians have made use of the doctrine for acts which strictly speaking did not fall within its

content. When, as has happened, this same doctrine is made use of to justify either interference with the internal affairs of a Latin American republic, or to warn off some too insistent creditor (in both cases probably in the long run to the advantage of both), or to cover some phase of imperialism either political or financial (for Republics no less than Empires are liable to severe attacks of chauvinism), the historians may well complain that the Monroe doctrine is misapplied or misunderstood; but that complaint will not prevent its use on similar future occasions. Only a well instructed people can distinguish between the true and false doctrine.

I have said that attempts are made from time to time by distinguished American statesmen and lawyers to recall the world to a more accurate understanding of President Monroe's message. I cannot do better than quote an extract from such an attempt by Mr. Elihu Root, a former Secretary of State, in a valuable address to the members of the American Society of International Law in the Spring of 1914. I should add that Mr. Hughes, the present American Secretary of State, in an address before the American Bar Association on August 30, 1923, and again on December 1, 1923, spoke in very similar language. We may take it that in its negative aspect Mr. Root's words which follow give us the present view of the Monroe doctrine as held by responsible American statesmen :

" A false conception of what the Monroe doctrine is, of what it demands and what it justifies, of its scope and of its limits, has invaded the public press and affected public opinion within the past few years. Grandiose schemes of national expansion invoke the Monroe doctrine. Interested motives to compel Central and South American countries to do or refrain from doing something by which individual Americans may profit invoke the Monroe doctrine. Clamours for national glory from minds too shallow to grasp at the same time a sense of national duty invoke the Monroe doctrine. The intolerance which demands that control over the conduct and the opinions of other peoples which is the essence of tyranny invokes the Monroe doctrine. Thoughtless people who see no difference between lawful right and physical power assume that the Monroe doctrine is a warrant for interference in the internal affairs of all weaker nations in the New World. Against this supposititious doctrine, many protests both in the United States and in South America have been made and justly made. To the real Monroe doctrine these protests have no application." [1]

On its positive side the Monroe doctrine sums up the traditional policy of the United States for the past century, namely,

[1] *Proceedings of the American Society of International Law*, 1914, p. 21.

that there shall be no intervention or domination by any non-American State in, nor any attempt to extend the European system to, any portion of the Western Hemisphere. This is the real Monroe doctrine, which is the basic principle of the foreign policy of the United States, which has deserved and enjoyed from the citizens of the United States " a popular affection and admiration which are hardly accorded to any other policy, save to the first principles of the Republic itself." [1]

[1] *The Times*, December 1, 1923.

WHAT IS THE LEAGUE OF NATIONS?

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One of the last things from Oppenheim's pen was a contribution to the *Revue Générale de Droit International Public* in 1919 entitled " Le Caractère essentiel de la Société des Nations," in which he stated summarily his reasons for regarding the League of Nations as a person, but a person *sui generis*, in international law. Oppenheim wrote at a time when the Covenant of the League had not yet come into force, consequently his opinion was formed purely on a study of that instrument as it stood, uninterpreted by the decisions and events which have followed the ratification of the Treaties of Peace and the consequent coming into operation of their Articles 1 to 26. The commentators who followed him have in general been more devoted to the task of demonstrating a thesis frequently in accord with his by arguments based on the letter and the theoretical consequences of the Treaties than to defining the organization as it exists and works. A study of the legal character of the League must essentially deal extensively with theory, but there is a point in the examination of any institution where it becomes impossible even for the lawyer to dismiss an inelegant development with the familiar distinction between the law and the fact. The object of the present article is to consider the League of Nations, not merely as it is established and defined by the Treaties of Peace, but as a living organism with a character formed partly by its origin and partly by life, and to attempt to determine in what class of legal phenomena that character places it. Is the League of Nations a person in international law? If so, must we, like Oppenheim, despair of bringing it within the existing category or categories of international persons and accept the surrender of his *sui generis*?

The State is, by definition, the person *par excellence* in international law. The older jurists were untroubled by the claims of any other entity. The determination of the rules which

governed or should govern the relations of State with State and the discovery of a philosophic basis for a *jus gentium* absorbed their attention. It is not until the nineteenth century, with the researches of German scholars into the theory of juristic personality, that the question emerges as one of the specific problems of international law. Even then it was practically ignored by English-speaking authors, as, indeed, it has continued to be.[1] The German, French, Italian and Swiss publicists of the latter half of the century display an extraordinary diversity of views on the subject. For the more conservative, States are the only international persons; some, on the other hand, admit unions of States; others attribute personality to the Roman Catholic Church, to sovereigns, diplomatic agents, and even to men as such. In the twentieth century we are still far from any doctrinal agreement, although now that men, sovereigns, and diplomatic agents are generally conceded to be objects rather than subjects of international law, the controversy appears to have narrowed down to a conflict between those who maintain the exclusive claim of the State and those who insist upon the personality of unions of States and international organizations.[2]

When we turn from the general treatises on international law to specific studies of the League of Nations we are confronted with a sharp difference of treatment, the inevitable result of the existence of these two divergent theories. There appears to be, however, among the writers on this subject, a majority opinion in favour of the personality of the League.[3] The problem is by

[1] English and American writers assume or assert dogmatically that States are the only subjects of international law. See, for example, Wheaton, Hall, Westlake, Phillimore, and Holland ("Jurisprudence").

[2] The following all admit various entities other than States to the class of international persons: Bluntschli (*Das Moderne Völkerrecht*, § 17 *et seq.*); Heffter (*Das Europäische Völkerrecht der Gegenwart*, §§ 14, 48); Fiore (*International Law Codified*, trans. Borchard, §§ 73, 81, and *Droit international public*, trad. Ch. Antoine, §§ 339, 340); Chrétien (*Principes de Droit international public*, §§ 76, 78); Mérignhac (*Traité de Droit public international*, Vol. II, p. 154 *et seq.*); Fauchille (Bonfils-Fauchille, *Manuel de Droit international public*, 8me éd., Vol. I, pp. 213 *et seq.*).

The following consider personality in the law of nations as an exclusive quality of States: Holtzendorf (*Handbuch des Völkerrechts*, Introduction and Vol. II, § 1); Jellinek (*Die Lehre von den Staatenverbindungen*, pp. 49, 173); Geffcken (in commentary on Heffter, *op. cit.*, § 48); Anzilotti (*Corso di Diritto Internazionale*, p. 88, and *Rivista di Diritto Internazionale*, 1914, pp. 156 *et seq.*); Von Liszt (*Völkerrecht*, 11th ed., 1920, p. 42).

[3] For personality: Oppenheim (article cited); Schucking and Wehberg (*Die Satzung des Völkerbunds*, pp. 61 *et seq.*); Rougier ("La première Assemblée de la Société des Nations" in *Revue générale de Droit international public*, Vol. XXIII, 1921,

no means one of purely academic interest. The practice of handing over common affairs and interests to permanent international organizations, which had developed so enormously in administrative matters before the war, has reached a climax in the social, economic, and political tasks assigned to the League of Nations ; no study of the international life of the present, which does not establish and adhere to a definition of that institution, can be complete or clear, and no attempt at a legal definition can evade the question of personality.

Commencing with the article by Oppenheim cited above, it may be useful to examine the main characteristics emphasized by commentators on the Covenant. Oppenheim affirms the personality of the League and proceeds to give examples of the rights and powers which, as a person of international law, it possesses. He instances the right of legation, rights of sovereignty (e. g. over the Saar and the mandated territories), the right of intervention for the protection of minorities, the capacity to hold a protectorate (e. g. over Danzig), and to declare war or peace.[1] This list of attributes is repeated by Fauchille [2] and by Schucking and Wehberg, who, in their exhaustive commentary on the Covenant, derive them, with other rights, partly from the texts and partly from the postulated character of the League as a Confederation endowed, as such, with personality.[3] In brief justification of their premise, they eliminate the alliance, the administrative union (Zweckverband) and the federation, and point to the completeness with which the League satisfies Jellinek's definition of the Confederation.[4]

Examining, as they actually exist, the phenomena classified

p. 200) ; Vallini (*I Mandati internazionali della Società delle Nazioni*, pp. 61, 63 *et seq.*) ; Bonfils-Fauchille (*Droit international public*, 8me éd, Vol. I, p. 215) ; Kleintjes (cited by Fauchille, *loc. cit.*, p. 216).

Against personality : Huber (" Die konstruktiven Grundlagen des Völkerbundsvertrages " in Kohler's *Zeitschrift für Völkerrecht*, 1922, p. 11) ; Rolin (" Le Système des Mandats coloniaux " in *Revue de Droit international et de Législation comparée*, 1920, Nos. 3–4, p. 334) ; Makowski (" La Situation juridique du Territoire de la Ville Libre de Dantzig " in *Revue générale de Droit international public*, 2nd Series, Vol. V (1923), pp. 215–16).

[1] Article cited, p. 239.

[2] Bonfils-Fauchille : *op. cit.*, Vol. I, p. 215.

[3] *Op. cit.*, pp. 61–74.

[4] Jellinek's definition, in *Allgemeine Staatslehre*, Ch. XXI, § 4, may be translated as follows : " The Confederation is the permanent union of independent States, based on agreement, and having for its object the protection of the territory of those States and the preservation of peace between them. Other objects may by agreement be pursued. This union requires a permanent organization for the realization of its ends."

by these authors as rights of legation, war and peace, sovereignty, intervention, protectorate, we find that some are incorrectly described, while the definition of others remains, in spite of this concourse of authority, open to doubt and objection. Taken literally, the bald statement of these alleged rights, which threatens to become a commonplace in legal commentary on the constitution of the League, conveys an erroneous impression of its character.

The right of legation. Several of the Members of the League of Nations maintain at Geneva permanent officials through whom communications to and from the Secretariat pass and whose duty it is to keep their Governments informed as to the progress of the League's work. On the other hand, the League, in the accomplishment of the tasks assigned to it in the Covenant or other agreements, frequently sends agents on missions to States and has permanent offices established in various countries. Further, it invites States-Members and others to send delegates to conferences. In Article 7 of the Covenant it is provided that "Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities."

It is this exchange of representatives which Oppenheim, Schucking and Wehberg, and Fauchille, instance as an exercise of the right of legation. Schucking and Wehberg, indeed, go so far as to advocate the adoption of rules for the *agréation* of agents sent by the States to watch over their interests at the seat of the League.

Any international organization established for purposes such as those which the League was destined to serve must inevitably have the power to employ agents whose duties will take them into the territory of the States belonging to the organization. Nor could it operate without the presence, at least from time to time, of persons representing its Members. But even leaving aside the obvious incapacity of the League to accord to persons accredited to it as an organization the special privileges attached to the diplomatic character, that is, "to receive" diplomatic agents in the full sense of the word,[1] do these essential faculties amount to the *jus legationum* as that institution is defined by international law?

[1] Note the incapacity to issue passports, recognized in the resolution adopted by the First Assembly (*Records of the First Assembly: Plenary Meetings*, p. 557).

The right of legation is generally described as a necessary corollary of the "fundamental right" of a State to independence, or, in other words, to sovereignty in its external aspect.[1] It is, as Westlake says, inseparable from the right of the State to contract and may therefore be exercised for as many objects as may be attained by contract between State and State. This absence of limitation in itself differentiates it from the right attributed to the League, which, like the other rights of that organization, is restricted to the narrower compass set by the instruments upon which its activity depends. But there are more essential differences than this. The right of legation is a capacity inherent in sovereignty, to send and receive diplomatic agents to and from any States with which such exchange may have been agreed upon. There is no strict obligation to send or to receive, though in comity a refusal must generally be based on serious reasons. Even in comity, however, there is no obligation to receive a particular agent; the receiving State has a certain control over the choice of representative, exercised by the procedure of *agréation*. The League has no control over the selection of persons sent by Governments to represent them at Geneva; it can do no more than examine the evidence of their due appointment. If they are duly appointed, there is no choice but to treat them as representing their State for the purposes of its transactions with the League. In other words, all that is required to obtain representation at the seat of the League is a unilateral expression of the will of a Member-State. The State, on the other hand, can undoubtedly refuse to receive a *persona non grata* as a representative of the League.

For these reasons, the competency of the League, an essential consequence of the tasks laid upon it by the various treaties, to employ agents for the accomplishment of those tasks in the countries where they lie, and to treat with representatives of its Members, cannot properly be described as the right of legation. It is only a power with some of the incidents of that traditional attribute of sovereign States. On its passive side, indeed, it is not a right, but an absolute obligation.[2]

[1] See discussion in Vattel, Édition Pradier-Fodéré, Paris, 1863, Vol. III, p. 219; Heffter: *op. cit.*, § 200; Chrétien: *op. cit.*, § 446; Westlake: *International Law*, Vol. I, Peace, Chapter XII; Mérignhac: *op. cit.*, Vol. II, p. 234; Calvo: *Le Droit international*, § 1321; Bonfils-Fauchille: *op. cit.*, § 658; Oppenheim: *International Law*, Vol. I, Peace, § 360.

[2] The "droit de légation passif" is of course merely the right, as against all the

The right to declare war and make peace. This alleged right is derived from a somewhat violent interpretation of Articles 10, 11, and 16 of the Covenant. It is true that in the events contemplated in these Articles the Council is called upon to take measures which may include a recommendation that the Members of the League should concert to carry on war against a State guilty of territorial aggression or of breach of the Covenant. Accepting for the moment the theory of a distinct entity, the question is whether these provisions have the effect, in certain eventualities, of automatically placing the resources of the States-Members at the disposal of the League in such a way as to constitute the latter a potential belligerent power.

Those who would answer this question in the affirmative will find a certain justification, more particularly in Article 16, where it is laid down that—

> " It shall be the duty of the Council in such case [resort to war by a Member in disregard of its covenants under Articles 12, 13 or 15] to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League."

This Article has been the subject of much discussion in the Assembly and its Commissions, to say nothing of the special Blockade Commission set up to study its implications. Apart from the deliberations of these bodies, which amount to a practically authentic interpretation and which will be touched on later, it is very doubtful on the face of the Article whether a war to be undertaken directly on the initiative of the League was ever contemplated. In the first place the resort to war dealt with in the first paragraph is deemed to be an act of war, not against the League, but against the Members thereof. Secondly, the Council merely " recommends," it does not instruct or determine, and the recommendation is addressed, not to all the Members of the League, but to " the several Governments concerned." Even from this it would appear that the action in view was a war to be carried on by some Members of the League, most affected by the breach of the Covenant, and who, taking *the act of war* as a legitimate motive, would place themselves in a *state of war* with the Covenant-breaking State. Of course even this may be construed as a League war, the States concerned

world, to receive diplomatic agents from any countries which may desire to send them.

acting as instruments of the League. But, as pointed out in the discussion on the Sixth Committee's report to the First Assembly [1] and reiterated in the report of the Third Committee to the Second Assembly,[2] it is for each Member to determine whether it will, on the occasion afforded by the act of war, declare war.[3] The main question then, viz., whether war is to be carried on, is decided not by any of the organs of the League but by each Member for itself. Given a number of Members who have declared war, the Council may conceivably exercise a certain directive influence by means of recommendations, but as such recommendations will require unanimity,[4] even this action will be impossible unless either all the countries represented on it are at war with the covenant-breaking State or those not at war abstain from voting.

The proposed amendments, which are directed to the provision of machinery for the conduct of the economic blockade, leave intact the principle that it is for each Member to decide whether the *casus belli* has occurred.[5] One of them goes so far as to enact that : " It is for the Council to give an *opinion* whether or not a breach of the Covenant has taken place." The mere use of the word " opinion " is sufficient to prove, apart from the discussion on this clause,[6] that the conclusions of the Council were not intended to have any binding effect, in the sense of compelling the Members to join in measures of repression. The sole effect of the " opinion " will be either to confirm belligerent measures already taken by a Member against the Covenant-breaking State, or, if it is negative, to render such Member itself liable to the consequences of breach of the Covenant if it continues the action begun.[7]

[1] *Records of the First Assembly ; Plenary Meetings*, pp. 399, 409, para. 2 (c) and *passim*.

[2] *Records of the Second Assembly ; Plenary Meetings*, p. 798 ; discussion, pp. 737, 739.

[3] Literally, to decide for itself whether a Member has gone to war in disregard of its covenants, i.e. whether the act of war has been committed ; *a fortiori* whether it shall put itself into a state of war with the said Member.

[4] Minus the votes of the covenant-breaker and the Members immediately affected, according to the terms of the amendment adopted by the Second Assembly but not yet ratified by a sufficient number of Members to bring it into force.

[5] Report of Third Committee to the Second Assembly. *Records of the Second Assembly ; Meetings of the Committees*, Vol. I, pp. 384, 385, 386, and *Records of the Second Assembly ; Plenary Meetings*, p. 739.

[6] See, e.g., *Records of the Second Assembly ; Plenary Meetings*, pp. 421 *et seq.*, and p. 737.

[7] *Records of the Second Assembly ; Plenary Meetings*, pp. 740, 798.

Article 10 is another of the provisions whose effective application is most likely to involve the use of armed force. Here again, however, it is the Members upon whom the obligation falls. The article does not read: "The League shall preserve as against external aggression," but: "The Members of the League undertake, &c." The Council is again called upon to "advise," but the effect which will be given to the advice is clearly apparent from the interpretation all but unanimously adopted by the Fourth Assembly:

"It is for the constitutional authorities of each Member to decide, in reference to the obligation of preserving the independence and the integrity of the territory of Members, in what degree the Member is bound to assure the execution of this obligation by employment of its military forces.

"The recommendation made by the Council shall be regarded as being of the highest importance and shall be taken into consideration by all the Members of the League with the desire to execute their engagements in good faith." [1]

It can scarcely be doubted that the same reservation in favour of the constitutional authorities of each country would apply to any measures advised by the Council under Article 11.

Evidently, then, a description of the League as an entity endowed with the capacity to carry on war and conclude peace must be taken with extensive reservations. A war carried on by Member-States after the publication of the Council's opinion that the breach of covenant had occurred, or for the enforcement of obligations of the League in other directions, would doubtless be described as a League war, but it would be a war undertaken, not at the command of the League, but on the voluntary decisions of the participating States. It is here precisely that the League approaches most nearly the mere alliance. As the dispositions relating to possible belligerent action are now understood, the initiative and power of applying them rest so entirely with the individual Members rather than with the central organization, that they demonstrate the absence of a corporate *jus belli ac pacis*.[2]

Rights of Sovereignty. If there is any sovereignty vested in the League, it should appear most clearly in the administration of the Saar, and in the application of the provisions regarding

[1] *Journal of the Fourth Assembly*, No. 21, p. 175; *Verbatim Record of the Fourth Assembly*, September 25, p. 8.

[2] Contrast the powers of the German Confederation under Articles 40 and 41 of the Act of May 15, 1820. The Diet decides on the declaration of war by a two-thirds majority, and all the States must contribute to the measures taken.

mandates. Apart from the charge relating to the Free City of Danzig, which is included in the above list under "capacity to hold a protectorate," these are the sole instances where the League is entrusted with the government or some share in the government of territory. It therefore becomes necessary at this point to analyse the functions assigned to the League in connexion with the Saar Basin and the mandated territories.

By Article 49 of the Treaty of Versailles, Germany "renounces in favour of the League of Nations, in the capacity of trustee, the government of the Saar Basin." The way in which this government is to be carried out is laid down in the Annex to Article 50, which provides for a Governing Commission of five members chosen by the Council of the League of Nations and sitting in the Saar Territory. On the Governing Commission are conferred all the powers of government within the Saar Basin "hitherto belonging to the German Empire, Prussia, or Bavaria." Justice is to be administered in its name; it alone may levy taxes; it legislates. One at least of the external rights and duties of a State is assigned to it, viz., "the protection abroad of the interests of the inhabitants."

Do the rights, duties, and powers attributed to the Governing Commission, the agent of the League, and to the League itself, amount to sovereignty? They do not. What Germany renounces is not the sovereignty, but the government of the Saar territory, and though government is indeed the chief attribute of sovereignty, there is a difference. Germany retains, at the minimum, the *nuda proprietas* of sovereignty, as she retains the *nuda proprietas* of all her domanial property, except the mines, in the Saar. The inhabitants retain their German nationality. The League, further, takes the government in trust, presumably for the inhabitants; and that trust is terminable [1] after fifteen years at the desire of the beneficiaries. It is true that the *nuda proprietas* left in Germany is made at least temporarily inalienable (unless indeed it should be alienated subject to a resolutory condition) by the treaty, under which the League is to decide, on the result of a plebiscite to be held in 1935, as to the future status of the territory. But the section [2] which imposes this limitation reveals the fact that the sovereignty of the Saar was intended to rest provisionally with

[1] Practically terminable, though all that the League is strictly bound to do is to "take into account the wishes of the inhabitants." See next paragraph.

[2] Section 35 of the Annex to Article 50.

the Reich, for it is therein declared that if the ultimate decision is for the maintenance of the existing régime Germany agrees " to make such renunciation of her sovereignty in favour of the League of Nations as the latter shall deem necessary."

While, however, the League is not vested with the sovereignty of the Saar, but only with some of its attributes, the dispositions of this part of the Treaty do contain an implicit recognition of the capacity of the League to exercise sovereignty properly so-called. For, not to emphasize the theoretically absolute power of disposal exercisable by the League in 1935 and limited only by the practical and moral necessity of recognizing the result of the plebiscite as the chief factor determining the decision, it is provided in Section 35 of the Annex to Article 50 that the League may in certain circumstances take over such sovereignty as remains in Germany. If this step should be taken, the régime would not be the existing one shown among the options in Section 34, but something legally quite different and constituting the League of Nations a sovereign State having the Saar Basin for territory.

Among the juristic riddles propounded by that loosely drafted instrument, the Treaty of Versailles, perhaps none is more difficult to solve with confidence than that concerning the sovereignty over the mandated areas. By Article 119, Germany " renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions." In the ill-fated Treaty of Sèvres, signed on August 10, 1920, Turkey, as one of the High Contracting Parties, agrees (Article 94):

" that Syria and Mesopotamia shall, in accordance with the fourth paragraph of Article 22, Part I (Covenant of the League of Nations) be provisionally recognized as independent States subject to the rendering of administrative advice and assistance by a mandatory until such time as they are able to stand alone." [1]

This agreement never came into force, but the Allied Powers, apparently considering Turkey's title to Syria and Mesopotamia lost by conquest and their will to independence, proceeded to organize the administration of those countries as if it had. The situation thus brought about, amounting to provisional recognition of Mesopotamia and Syria as independent States, is consecrated by the Franco-Turkish Agreement of October 20, 1921,

[1] By Article 132 of the same Treaty, Turkey renounces in favour of the Principal Allied and Associated Powers all rights and title to Mesopotamia and Syria.

as to Syria, and by the Treaty of Lausanne of July 24, 1923, as to both.[1]

In Syria and Mesopotamia, then, the position is briefly this. As a result of the war with Turkey the Allied Powers had at their disposal certain territories in Asia Minor. Having regard to the principle of self-determination and to the desire of the inhabitants, they gave them the provisional status of independent States, subject to certain restrictions, by a Treaty which, though not formally ratified, has for these dispositions the tacit ratification of three years' observance. That Turkey accepts the arrangement is shown by the National Assembly's decision in favour of the ratification of the Treaty of Lausanne,[2] which leaves the territory affected outside her borders. The restrictions on independence are in each case the powers given, by decision of the Supreme Council at San Remo[3] (confirmed, as to Syria, by the Council of the League of Nations on July 24, 1922),[4] to Great Britain for Mesopotamia and to France for Syria. The Council of the League has from time to time postponed consideration of the British mandate for Mesopotamia, first in deference to the request of the United States to be consulted, and later owing to the negotiations between Great Britain and King Feisal which culminated in the Treaty of October 10, 1922.[5] Yet, although the British Government did not, at any rate originally, regard itself as under any legal obligation before confirmation of its mandate to submit reports on its administration, it declared itself willing to do so[6] and has in fact submitted reports.[7] It has, further, according to the statement of its representative on the Council, regarded itself throughout as acting solely on behalf of the League of Nations.[8] This statement, coupled with the submission of reports, amounts to a recognition of responsibility to the League for the governance of the country, and it may accurately be said that Great Britain

[1] Article 8 of the Franco-Turkish Agreement [Cmd. 1556], and Articles 3 and 16 of the Treaty of Lausanne.

[2] *The Times*, August 24, 1923.

[3] See Franco-British Convention of December 23, 1920 [Cmd. 1195 of 1921].

[4] League of Nations documents, C. 528, M. 313, 1922, VI.

[5] *The Times*, October 12, 1922.

[6] Minutes of Sixth Commission cited in *Records of the Second Assembly; Plenary Meetings*, p. 347.

[7] See *Records of the Third Assembly; Plenary Meetings*, Vol. II, p. 54, and *Official Journal*, October 1923, p. 1217.

[8] See statement of British representative on the Council, January 30, 1923 (*Official Journal*, March 1923, p. 201).

is "advising and assisting" Iraq under the supervision of the League, and in accordance with the principles laid down in Article 22. The only element lacking to the complete regularity of the position is the Council's confirmation of the detailed provisions for the application of those principles.

The effect of this is that the sovereignty of Syria and Mesopotamia, taken over by the Allied Powers, has been vested by these Powers in Syria and Mesopotamia themselves. In the recognition, provisional because its continuance will depend on the development of these countries as political units, certain powers usually coupled with independence and sovereignty were reserved for exercise, under the supervision of the League of Nations, by a Mandatory to be chosen by the Allied and Associated Powers. That choice was the last act of sovereignty on the part of the Allied Powers as such over the territories in question. Henceforward such powers as have not been transferred to the inhabitants of the territories themselves are divided between the Mandatory and the League.

Reading the mandate for Syria and the Lebanon as approved by the Council and the Treaty between Great Britain and Iraq, we find that the position of the Mandatory is closely analogous to that of a State exercising a protectorate. The powers retained by the protector over Syria are greater than those left to Great Britain under the treaty with Iraq, comprising as they do the initiative in the establishment of a constitution and of a judicial system, the complete control of external affairs, &c. But these powers, accorded to France in order that she might fulfil her express duty to "advise, assist and guide the inhabitants in their administration," and facilitate the "development of Syria and the Lebanon as independent States," [1] and exercised by consent of the League of Nations, are obviously contemplated as temporary. The constitution is to be completed in three years (Article 1), and provision is already made (Article 19) for the recognition, by the "Government of Syria and the Lebanon" at the end of the mandate, of the financial obligations regularly assumed by the present administration.[2]

[1] See French text of the Mandate, Preamble, and Article 1, League of Nations document C. 528, M. 313, 1922 VI.

[2] The powers of France in Syria are scarcely greater than were those of Great Britain in the United Republic of the Ionian Islands. There the protecting State appointed the head of the Government, exercised the executive authority, and controlled foreign relations. Yet the Republic was declared to be an independent State

The "C" mandates, over former German possessions in the Pacific and South-West Africa, were distributed by decision of the Supreme Council on May 7, 1919, and their terms defined by the Council on December 17, 1920. The "B" mandates, over certain regions in Central and Eastern Africa, were not finally settled until July 18,1922, though the States exercising them were named in the same decision. In both cases the States entrusted with administration assume, owing to the low level of social and political development reached by the inhabitants, wider powers than in Syria, Mesopotamia, and Palestine. There has been of course no recognition, provisional or otherwise, of independence, nor is there the same likelihood of fitness, in the near future, for complete self-government.

The above paragraphs give a general account of the status of the mandated territories. As regards Syria and Mesopotamia, the question of sovereignty has already been dealt with; they form independent States over which are held powers amounting to protectorates exercised under the League's supervision. Palestine is subject to a régime peculiar to itself and approaching very closely the protectorate, but falling for the purposes of legal definition within the same group as that pertaining to countries under mandates "B" and "C."[1] Let us now attempt to define more closely the rôle played by the League in this system of so-called tutelage.

Article 22 of the Covenant declares that the well-being and development of the peoples inhabiting certain vaguely defined regions form a sacred trust of civilization, and lays it down that—

"the best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League."

under the protection of Great Britain and remained neutral during the Crimean War. See the convention between Great Britain and Austria, 1815 (De Martens: *Nouveau Recueil*, Vol. II, p. 663; summary in Hall: *International Law*, 1st ed., p. 24).

[1] There has been no recognition of Palestine's independence, and the duty assigned to the Mandatory is not advice and assistance, but administration itself. But the inhabitants have separate nationality and the country is regarded as a unit, under an "Administration" appointed by but distinct from the Government of the Mandatory, having distinct foreign relations. See text of the mandate, particularly the preamble and Articles 7, 12, 19, and 28 (League of Nations document C. 529, M. 314. 1922, VI).

Paragraph 8 goes on to provide that—

"the degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Member of the League, be explicitly defined in each case by the Council."

It is this eighth paragraph of Article 22 and the inferences drawn from it that have cast the whole system of mandates as a legal institution into confusion. Some have seen, in the mention of the Members of the League, a reference to the Assembly [1] and have accordingly condemned the selection of the Mandatory by the Allied Powers, and their pre-determination of the conditions of mandate in virtue of the interpretation acted on by the Council. For the Council, like some of our commentators,[2] held that under this paragraph the Mandatory must be designated by the Members of the League to whom originally had been transferred the sovereignty in the territories affected, that is to say, by the Principal Allied Powers, who must further have the option of fixing the conditions under which those territories were to be administered.[3] The view that such was the intention of the Allied Powers finds support in the statement contained in M. Hymans' report that they had at first thought of themselves as the sole original Members of the League, and in the fact that they did name the Mandatories for certain territories before the Treaty of Versailles had been so much as signed, that is to say, eight months before the League had come into existence.[4] Again, in the Treaty of Sèvres, signed after the discussion in the Council referred to above, it was expressly provided, as if to remove any doubt on the whole matter, that the Mandatories for Syria, Mesopotamia, and Palestine should be named by the Principal Allied and Associated Powers.

The preambles to the various mandates almost invariably recite the fact that the Principal Allied Powers have agreed that a mandate shall be conferred upon such and such State,[5] and that the

[1] Schucking and Wehberg: *op. cit.*, pp. 430–1.

[2] See, for example, H. Rolin in the *Revue de Droit international et de Législation comparée*, 1920, Nos. 3–4, p. 334.

[3] See Report of M. Hymans to the Council, August 5, 1920 (*Records of the First Assembly; Meetings of the Committees*, Vol. II, p. 378).

[4] See Notes of meeting held on May 7, 1919, reproduced in *Records of the First Assembly; Meetings of the Committees*, Vol. II, p. 375.

[5] The mandates for the Cameroons and Togoland recite the agreement of the Principal Allied and Associated Powers that France and Great Britain should make a joint recommendation to the League as to the future of these territories, and state

State in question undertakes to exercise it on behalf of the League of Nations. Obviously these statements and the events which lie behind them, summarily recounted in the preceding paragraph, do not correspond to mandate as that contract is understood in civil law. There the mandant chooses his own mandatory and the terms are settled between them or left to the common law. If the intention in drafting Article 22 had really been, as has been argued,[1] to transfer to the League the sovereignty surrendered by Germany and Turkey to the Allied Powers, if it was really on the League's behalf that the so-called Mandatory was intended to act, would the League not have been given unequivocal power not merely to settle details of administration in so far as this has not been done but to choose the Mandatory and to settle the terms with him ?

The appointment of the administering State by the Allied Powers and, in some cases, their preliminary fixation of the terms, have been explained in various ways. According to M. Van Rees, Vice-President of the Permanent Mandates Commission, the sovereignty of Germany over her oversea possessions " has passed to the Principal Allied and Associated Powers " (and apparently remains there), " while the right of supervision appertaining to these Powers as grantors of the mandates has automatically passed to the League of Nations." [2] M. Rolin regards the act which the Covenant describes as a mandate rather as a transfer or partition of the sovereignty in the former German Colonies. The so-called Mandatory becomes sovereign over the territory assigned to him, the rôle of the League being merely that of an organization charged by agreement with seeing that government is carried on in accordance with the principles laid down in Article 22. The whole machinery in M. Rolin's opinion is a disguise for annexation.[3]

M. Rolin wrote in 1920, before the mandatory system had got under way ; M. Van Rees leaves out of account the English law of trusts. Article 22 was drafted in the first place in English, and though the language used, particularly in the first two paragraphs, is popular rather than legal, it is plain that the idea of trust runs

that Great Britain and France have recommended to the Council that a mandate should be conferred on His Britannic Majesty as to part of them and on France for the other part. It may be held in these instances that the League confers the mandate.

[1] Schucking and Wehberg : *op. cit.*, pp. 68, 423–5.

[2] Permanent Mandates Commission, League of Nations document A. 19 (Annexes), 1923, Vol. VI, p. 222.

[3] *Revue de Droit international et de Législation comparée*, 1920, Nos. 3–4, p. 350.

through it. The territories dealt with are to be administered for the benefit of their population and in such a way as to secure their development to a stage where they will be "able to stand by themselves." The process in some cases will be long, the principle is the same in all: the first consideration is to be the welfare and social development of the inhabitants. The terms of the mandates themselves, the discussion in Council and Assembly, the reports submitted, the resolution of the Council on national status,[1] all negative the idea of annexation and prove that the control exercised by the League is a real one.

The powers grouped under the term sovereignty have, as regards the mandated territories, been divided. In general they rest with the Mandatory, but some of them are reserved to the League of Nations.[2] That the latter is not a trustee employing States as agents in administering its trust is evident from the way in which these States have been selected. The appointment by the Allied Powers of one of their number as Mandatory could only mean that a given territory and its people were being handed over for administration in accordance with the principles laid down in Article 22 of the Covenant, principles already settled by agreement among themselves. The territory is transferred in trust to be administered for the benefit of its inhabitants, and in certain respects, such as equality of commercial opportunity, for the benefit of the Members of the League, until such time, near or distant, as the community may be able to stand alone or at least be entrusted with the decision of its own fate. To secure the due performance of the trust, the machinery of the League is employed. The Council of the League establishes, where this has not already been done, the rules governing the application of the principles of Article 22 to the particular conditions in each mandated area. The power of regulating, within the limits of Article 22, the government of a country is undoubtedly a power of the nature of those exercised by persons or groups invested with sovereignty; to this extent, and to this extent only, the League can be said to possess or exercise sovereignty over the former German possessions. But this power is sufficient to remove not merely the

[1] Resolution of April 23, 1923. See *Report to Fourth Assembly of the League on the Work of the Council* (A. 10, 1923), p. 46.

[2] Approximately the same conclusion is arrived at by Mr. Quincy Wright in the *American Journal of International Law*, October 1923, p. 698, where he says: "The present writer believes that there will be a close approach to truth in ascribing sovereignty to the mandatory acting with the consent of the Council of the League."

appearance, as M. Rolin would have it, but the possibility of annexation by the administering State. For convenience the mandated territory is in some cases to be *administered* as an integral portion of that of the Mandatory. It is never to be incorporated in the territory of the Mandatory and the national status of its inhabitants is to remain separate.[1] The distinction is analogous to that existing in English law between a man's own property and that of which he is legal owner as trustee.

The words "on behalf of", repeated in the text of the Mandates from Article 22, are evidently inaccurate; all that they really signify is the recognition of a certain power of control. Taken literally, they would imply that sovereignty rests with the League of Nations and that administration is being carried on by delegation from it. They would accordingly imply a power of revocation and it is submitted that this does not exist in the hands either of the League or of the Allied Powers. In the first place, no explicit provision is anywhere made for it; secondly, it is clear on the facts that there was never any intention of reserving a right to review the disposition made and therefore that no power of revocation is to be inferred. The geographical situation of the territories involved, their economic and strategical significance to the Mandatory States, the manner in which the latter were chosen, not by a free vote of all the Members of the League or even of all the Allied belligerents, but by a small group of specially interested Powers, is quite sufficient to demonstrate that the distribution is definitive. These considerations also negative the view taken by M. Van Rees in the report cited above, that the Allied Powers retain the sovereignty transferred by Germany in the Treaty of Versailles. The choice of the Mandatory was, as M. Rolin maintains, a transfer of "rights and titles" subject to certain conditions the observance of which is to be secured by the League. Nothing was retained for the Allied Powers as such.

Precisely because the Allied Powers were giving up to individual members of their group the rights ceded to them as a group, at a time when annexation was politically inexpedient if not rendered impossible by conflicting claims, it became necessary to link up the administration of the ceded territories with the League of Nations. By making the general rules intended to govern this administration part of the Covenant, the interests

[1] Resolution of the Council cited p. 134, note 1.

of States other than the Mandatory and the interests of the natives would be protected by such authority and force as the League might be endowed with or acquire. Short of the international common law sanction, war, the obligations of the Mandatory are sanctioned as, and only as, obligations under the Covenant.

The right of intervention. As an organization of States for the preservation of peace, the League of Nations is essentially endowed with the right to intervene between its Members to prevent or stop hostilities. It has already had occasion to exert its influence for this purpose, as for example between Poland and Lithuania and between the Serb-Croat-Slovene Kingdom and Albania. But the right of intervention, properly so called, is a right to exercise direct temporary control in certain contingencies over events happening within a State itself, and exists either for the protection of fundamental rights of the intervening State or, under treaty, for objects specified therein. Whether such a right may be claimed by the League may be best ascertained by reference to the system established at the Peace Conference for the protection of minorities, for it is in this connexion that such control would appear most likely to be called for.

The Treaties of Peace with Austria (September 10, 1919), Bulgaria (November 27, 1919), Hungary (June 4, 1920), and the special treaties with Poland (June 28, 1919), Czecho-Slovakia (September 10, 1919), the Kingdom of the Serbs, Croats, and Slovenes (September 10, 1919), Roumania (December 9, 1919), Greece (August 10, 1920), all contain clauses designed to secure equitable treatment of racial, linguistic and religious minorities. In each case the State binding itself to place the members of such minorities in a position of equality "in law and in fact" agrees that this obligation shall be placed under the guarantee of the League of Nations. The obligation of guarantee has been accepted by the League in resolutions of the Council, the earliest of which dates from February 13, 1920.[1]

The nature of the obligation thus assumed is indicated in M. Clemenceau's letter to M. Paderewski, accompanying the text of the treaty with Poland.[2] There it is stated that—

"It has for long been the established procedure of the public law of Europe that when a State is created, or even when large accessions of territory are

[1] *Verbatim Report of the Sixth Meeting of the Second Session of the Council*, p. 21.
[2] Cmd. 223 of 1919.

made to an established State, the joint and formal recognition by the Great Powers should be accompanied by the requirement that such State should, in the form of a binding international convention, undertake to comply with certain principles of government."

Reference is made to the clauses providing equal status for members of minorities and the letter then continues—

" Under the older system the guarantee for the execution of similar provisions was vested in the Great Powers. Experience has shown that this was in practice ineffective, and it was also open to the criticism that it might give to the Great Powers, either individually or in combination, a right to interfere in the internal constitution of the States affected which could be used for political purposes. Under the new system the guarantee is entrusted to the League of Nations. The clauses dealing with this guarantee have been carefully drafted so as to make it clear that Poland will not be in any way under the tutelage of those Powers who are signatories to the Treaty."

As these words indicate, the duty of seeing that the minorities clauses are observed was intended to rest with the League of Nations. That this task is actually incumbent on the League is the view taken by the Council as expressed in the report submitted by the Italian representative and adopted on October 27, 1920.[1] According to this report, the guarantee of the League of Nations " means that the League must ascertain (*s'assurer* in the French) that the provisions for the protection of minorities are always observed." [2]

The obligation of the League is accompanied by the right, necessary for its fulfilment, to take such action as may be " proper and effective in the circumstances." [3] Intervention in the internal affairs of a State need not take the form of despatching troops into its territory. Armed force would appear to come within the means contemplated in the treaties but, as we have seen, any military action recommended by the Council would depend on the voluntary co-operation of Members of the League. Effective action in the event of flagrant oppression might therefore present difficulties, though States racially connected with the oppressed minority would probably be ready enough to

[1] *Procès-Verbal of the Tenth Session of the Council*, p. 143.

[2] I have emphasized this point, which may already seem clear on the texts, because doubt has been cast upon it. For example, Mr. Ifor Evans, with whom on this point I am unable to agree, states in a contribution to the *British Year Book of International Law*, 1923–4, p. 113, that " the Council of the League of Nations is not charged with the responsibility of seeing that these obligations are actually carried out . . ." What, then, is the meaning of guarantee ?

[3] Article 12 of the treaty with Poland.

come forward. It is none the less true that the minorities treaties invest the League with a right of intervention exercisable by such means as the Council may from time to time dispose of. In the contingent effectiveness of its exercise the right does not differ in kind from any of the rights recognized in international law, where the ultimate sanction has always been the force applicable by the injured party. What marks this as a veritable right in the hands of the League, as contrasted for instance with the alleged right of peace and war, is the fact that the decision to intervene rests with the Council, whereas the decision to apply the sanction of war can only be taken by each State for itself.

The guarantee has already been brought into play and the right of intervention exercised. It was through the action taken by the Council between November 1921 and December 1923, on the petition of the Germanic League in Poland, that the expulsion of German colonists from their farms was stopped, and that Poland accepted a resolution calling for just compensation to those expelled.[1]

Power of holding a protectorate. Under this rubric the relations between the Free City of Danzig and the League of Nations are frequently placed.[2] The Treaty of Versailles, in its Articles 100 to 104, provides for : (1) the transfer of Germany's rights and title over the territory of Danzig to the Principal Allied and Associated Powers ; (2) the establishment of the town and region of Danzig as a free city ; (3) the protection of the State thus formed and the guarantee of its Constitution by the League of Nations ; (4) the negotiation of a treaty between Danzig and Poland which should place the Free City within the Polish customs frontiers, secure for Poland the use of facilities in the harbour necessary for her imports and exports, and give Poland the conduct of the foreign affairs of the Free City.

The treaty referred to in (4) was concluded on November 9, 1920 ; the Principal Allied and Associated Powers established the Free City of Danzig on November 15, 1920, and the Council of the League of Nations, in a resolution taken two days later, accepted the duty of protection and guarantee.

[1] See *Report to the Third Assembly of the League on the Work of the Council*, &c., and *Report to the Fourth Assembly of the League on the Work of the Council*, &c. ; also *Minutes of the Twenty-seventh Session of the Council*, December, 1923 (*Official Journal*, February, 1924).

[2] Oppenheim in the article cited and in *International Law*, 3rd ed., Vol. I, p. 271 ; Schucking and Wehberg : *op. cit.*, pp. 69–70 ; Fauchille : *op. cit.*, Vol. I, p. 215.

The interpretation of these various dispositions has given rise to numerous disputes between the two parties immediately concerned, disputes which have been dealt with in the first instance, as provided in Article 103 of the Treaty of Versailles, by the High Commissioner of the League of Nations at Danzig, and in many cases carried on appeal to the Council of the League. Practically all differences have now been settled by decision or agreement and the result is a more or less clearly defined body of rules as to the rights and duties of Poland, the League and the Free City itself in the territory which forms the subject of Part III, Section XI, of the Treaty of Versailles.

The Council's view of the duties of the League as protector and guarantor is set out in the report of the Japanese representative, adopted on November 17, 1920.[1] They include the maintenance of the territorial integrity and political independence of Danzig against any foreign aggression; the exclusion of all individual interference, except as provided for in its establishment, by other Powers in its affairs; the examination of the Constitution, exclusion therefrom of all elements contrary to the Treaty and subsequent conventions, prevention of changes in its text without the consent of the League, and maintenance of the constitutional life of the Free City in accordance with its terms.

It was in exercise of the right of supervision which necessarily accompanies the above duty of guarantee that the Council called for modifications in the draft Constitution submitted by the Constituent Assembly of Danzig. These amendments had to do with the term of office of Senators of the Free City, with the right of the League to demand information, with the prohibition of the use of Danzig as a military or naval base and of the construction of fortifications or manufacture of munitions without the consent of the League, with the acquisition and loss of citizenship and with the rights of Poland. It was only after their acceptance by the Constituent Assembly that the High Commissioner was authorized by the Council to give his approval, under Article 103 of the Treaty of Versailles, to the Constitution.[2]

It was in connexion with the duty of protection that the

[1] *Procès-Verbal of the Eleventh Session of the Council*, pp. 69 *et seq.*

[2] *Minutes of the Sixteenth Session of the Council*, p. 145 (*Official Journal*, February 1922); and *Minutes of the Eighteenth Session of the Council*, p. 668 (*Official Journal*, June 1922).

Council instituted a study by the Permanent Advisory Commission for Military, Naval and Air Questions of the best method of organizing the defence of the Free City, and authorized the High Commissioner in the event of sudden aggression to invite Poland to send the troops necessary to repel invasion. It is agreed, however, that the Council may arrange for the collaboration of other forces in the defence, and that in any case Poland must withdraw her troops when in the opinion of the High Commissioner their presence is no longer required.[1]

The League, then, has and exercises the right of intervening in the political life of the Free City and is charged with the duty of protecting its independence. Do the powers and duties of the League in this behalf constitute Danzig a protectorate of the League? It is submitted that they do not. Poland has the conduct of the foreign relations of the Free City, not on behalf of the League or of the Free City, but in her own interest,[2] and though this does not mean, as will be seen later, that Poland has absolute control of Danzig's foreign relations, it is sufficient to prevent the classification of that city as a protectorate of the League. The conduct of foreign relations by a third party is incompatible with the idea of the protectorate in international law.

On the other hand, the Free City cannot properly be described as a Polish protectorate. In the first place, the relation of protection is absent. As we have seen, it is the League which is under the obligation to protect, and though special arrangement is made for calling in Polish assistance for this purpose, Poland will act, if she consents to act, solely as agent of the League. Treaties establishing protectorates constantly provide for protection moving from the Power holding the protectorate—the term is by no means merely conventional—and as constantly for the control of foreign relations, a necessary premise of protection.[3] Poland has nowhere assumed an obligation to protect and has not a complete control of foreign relations. She must, for example, when Danzig requests her to do so, conclude on the latter's behalf any treaty which is not clearly in opposition to important Polish

[1] *Official Journal*, September 1921, p. 671.

[2] See reply of Peace Conference to German Representatives.

[3] See Makowski ("La Situation juridique du territoire de la Ville Libre de Dantzig" in *Revue générale de Droit international public*, 2nd Series, Vol. V (1923), p. 169) for examples, and Dr. Otto Loening: "Das angebliche Protektorat Polens über Danzig" in Kohler's *Zeitschrift für Völkerrecht*, 1923, pp. 489 *et seq.*

interests,[1] while, on the other hand, international agreements affecting Danzig cannot be concluded without previous consultation with the Free City,[2] and any international agreement which in the opinion of the Council of the League of Nations is inconsistent with the status of the Free City may be vetoed to the extent of the inconsistency by the High Commissioner.[3] Danzig, further, has a right to send delegates to international conferences; such delegates, while not entitled to an independent vote, may take part in the discussion of any economic questions affecting the interests of their State.[4]

Danzig, therefore, is not a protectorate of Poland nor of the League of Nations.[5] It is true that if the powers exercised by the League and Poland and the duties incumbent upon them were combined in the hands of one State, Danzig could be accurately described as a protectorate of that State, but we cannot go on to argue from this that the Free City is a joint protectorate of Poland and the League, for this would be incompatible with the clear-cut division of power already described. The rights and duties of Poland and the League *vis-à-vis* Danzig are in no way joint; they are several and distinct. What then is the status of Danzig? It is simply that of a State carved out of ceded territory and the inhabitants thereof and endowed by the Allied Powers, when they established it, with a sovereignty subject to restrictions, some of which were for the benefit of Poland while the others were a necessary consequence of the guarantee and protection incumbent upon the League of Nations. Further than this it is unnecessary and impossible to go.

The five attributes of the League which have been studied in some detail under the headings Right of Legation, Right to declare War and make Peace, Rights of Sovereignty, Right of

[1] Poland is not the final judge as to whether the treaty would be to the detriment of her interests. Refusal on this ground is subject to appeal to the High Commissioner and from him to the Council. See *Minutes of the Eighteenth Session of the Council*, pp. 676–8 (*Official Journal*, June 1922).

[2] *Minutes of the Twenty-sixth Session of the Council*, p. 1420 (*Official Journal*, November 1923).

[3] Treaty of November 9, 1920, between Danzig and Poland, Article 6, para. 2.

[4] *Minutes of the Twenty-third Session of the Council*, pp. 258–9 (*Official Journal*, March 1923).

[5] See Dr. Otto Loening: *loc. cit.*, p. 489. Nor is it, as M. Makowski would have us believe (*loc. cit.*, pp. 169 *et seq.*), "an autonomous entity over which Poland extends her sovereignty." That is sufficiently apparent from the share of the League in its government and from the very limited nature of Poland's powers in the territory.

Intervention and Power of holding a Protectorate have been seized upon by publicists because these are rights "which, as a general rule, can only be exercised by sovereign States"[1] and which therefore lend most weight to the definition of the League of Nations as a person in international law. If, reversing the process, the existence of these rights could have been proved, the statement that the League is a juristic person would have been fully justified. But their existence, in a form clearly satisfying the settled concepts of international law, would tend to prove much more than their exponents desire, viz., the presence of an entity which it would be difficult to distinguish from the State, and constituting, perhaps, the invariably repudiated super-State.

Personality in international as in municipal law is simply distinct subjectivity to rights and duties. From this strictly juridical point of view the so-called "legal," "moral" or "artificial" person is as little fictitious, but is as "real," as the human being.[2] But, observing the traditional distinction, there is nothing in the nature of things to prevent the recognition in international law of artificial persons consisting of groups of States, the State, itself generally a fictitious person in municipal law, being regarded as the natural person of the law of nations. An objection has been raised to the effect that personality is conferred by the sovereign authority which makes the law of the State, and that as there is no such preponderant authority over States themselves, there is no person or body to perform this necessary act to sovereignty.[3] This is of course merely the argument that there is no international law dressed in another form. The same reasoning would tend to disprove the international personality of the State itself, since this quality is not an essential characteristic of the State, but results from recognition by the members of the family of nations.[4] Once the existence of international law is admitted, it must be recognized that the States whose consent is the immediate cause of that law can create what legal institutions they will.[5] If it be conceded, then, that personality is

[1] Oppenheim, in the article cited, p. 239.

[2] Saleilles: *De la Personnalité juridique*, pp. 515–16, 544–5 *et seq.*

[3] Jellinek: *Gesetz und Verordnung*, pp. 46 *et seq.*

[4] Cf. H. Rolin: "Le Statut des Dominions" in *Revue de Droit international et de Législation comparée*, 1923, Nos. 2 and 3, p. 201, note; and Fiore: *Droit international public*, trad. Antoine, § 309.

[5] Cf. Mérignhac: *op. cit.*, Vol. II, p. 156.

subjectivity to rights and duties, the States in creating an entity other than a State, with distinct rights and duties, thereby create a person. It is not necessary to inquire whether the rights and duties appertaining to the entity are among those most characteristic of the State itself; they need only be faculties and obligations defined by the law governing the relations between the creating States.

The Treaties of Peace in general and the Covenant of the League of Nations in particular constitute law governing the relations of the parties thereto. In so far, indeed, as they purport to lay down general rules of conduct rather than to settle particular questions, they belong to the series of so-called "law-making" treaties. These agreements, forming for the participating States a portion of international law, undoubtedly assign rights and duties to an organization styled the League of Nations. The first part of this article is devoted to a study of some of the more important functions of the League as they have been explained by certain jurists. In most cases it has been argued that the classification arrived at is inaccurate. But though it is impossible to concur unreservedly in the recognition of rights of legation, sovereignty, peace and war, and of the capacity to hold a protectorate, it has been inevitably conceded that the League does possess and exercise, in addition to a very general right of intervention, powers bearing a more or less close relation to these institutions of international law. That it is also under obligations to perform certain defined tasks is too clear to require demonstration. The question is whether these obligations, active and passive, are acquired or assumed directly by Great Britain, France, Haiti and all the other States concerned, as a result of the treaties or of subsequent agreements, or whether they are the patrimony, as it were, of an entity created by these States but distinct from them. Is the term "League of Nations" merely an abridged way of saying "Members of the League of Nations," or does it correspond to a unit with an independent existence?

In general, the Covenant itself is so worded as to constitute the Members of the League the subjects of its stipulations. It is the Members of the League who undertake to exchange full and frank information as to the scale of their armaments (Article 8), to respect and preserve the territory and independence of the Members against external aggression (Article 10), to

submit disputes to arbitration or to inquiry by the Council (Article 12), to subject a Covenant-breaking State to measures of repression (Article 16), to register treaties (Article 18). In all this, as in the provision (Article 2) that " the action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat," there is little to indicate anything more than an ordinary multilateral agreement providing machinery in certain cases for the performance or guidance of acts of common interest. But when we find that the permanent secretariat is not composed of representatives of the Members or of one Member, but of officials of the League distinct from representatives of the Members (Article 7); that the League can occupy property apparently distinct from that of the Members (Article 7); that the *Members* undertake *to entrust the League* with supervision over the execution of various agreements and over the traffic in arms and ammunition (Article 23); finally, that international bureaux are to be placed under the direction of the League; we clearly are entering what is in municipal law the domain of the juristic person.

The property of the League in land and movables, its powers of government in the Saar Basin, the protection which it is bound to afford, the guarantees which it has assumed, the supervision which it exercises and the contracts of personal service into which it enters are all doubtless explained by the opponents of personality as a system of collective rights and obligations. The fact that much the greater part of the system would come to an end with the dissolution of the League rather than be distributed among the ex-Members, which, to those who regard the League as a person in international law, results from the *intuitus personae* entering into its contractual relations, may possibly be accounted for as the effect of another condition without which most of the above-mentioned rights and obligations would not have been granted or accepted. That condition would presumably be described as a resolutory one dependent upon the continuance of the mutual relations and common organs, established by the Covenant, which would inevitably disappear in the event of dissolution.

These explanations, inadequate and artificial when it comes to defining the respective spheres of the collectivity and its component parts, especially where, as in respect of the mandates and the supervision of the various " traffics," the Member would be one of the active subjects and at the same time the sole passive subject

of a right, break down completely when confronted with the circumstances next to be dealt with.

The minorities treaties, in providing for the protection of the sections of populations which they concern, refer this obligation to the League, not to the Members of the League. The same is true in regard to Danzig, where it is the League which is to protect and guarantee. This terminology of course is not in itself decisive; "the League" may be used as a synonym of "the Members of the League." But there is already an indication that what was contemplated as having to assure the observance of the minorities clauses was not so much the States as the proposed organization. M. Clemenceau, in the letter accompanying the text of the Treaty with Poland, points out that "the clauses dealing with this guarantee have been carefully drafted so as to make it clear that Poland will not be in any way under the tutelage of those Powers who are signatories to the Treaty." Evidently, it is more consonant with independence to be subject to the supervision of an impartial international organization than to the intervention of one or all of half a dozen States. There is, then, a distinction to be drawn between the Powers and the institution which they were establishing.

The distinction becomes even clearer in the procedure adopted for the acceptance by the League of the obligations under which the minorities treaties and the arrangement relating to Danzig purport to place it. Neither the League itself nor all of its Members were parties to these dispositions which, further, did not form part of the Covenant and were consequently not by the mere fact of Membership binding upon a State. If the obligations of the League are merely those of its Member-States, acceptance could only have taken place by the individual consent of those States. Any other hypothesis would imply that in entering the League, a State makes a comprehensive delegation of powers enabling an external body to accept on its behalf engagements which would ordinarily involve the intervention of its executive or even of its legislative authorities. Such a delegation, of the most doubtful legality for many of the States-Members, could, if and where it is legal, only result from the clear and specific consent of the delegating State. Neither the Covenant nor the conditions imposed on newly admitted Members contain stipulations endowing any organ of the League with the power to place a State under direct obligations of this nature. Yet the protection

of minorities and the protection and guarantee of the Free City of Danzig were accepted for the League by simple resolutions of the Council.[1] The validity of the acceptance has never been questioned. Why? Because these undertakings of the League of Nations are contemplated not as directly binding the States-Members, but as obligations of the organization as such, to be carried out by whatever means it can command. They were therefore validly assumed by the agent competent to declare the will of the organization in the particular case, i. e., the Council. The fact is a proof of that group-will which M. Huber refuses to recognize in the League and the absence of which demonstrates, for him, its non-personality.[2]

It may be argued that to establish this distinction between the League and its Members is to deprive the organization of the power to enforce its rights and to fulfil its obligations.[3] The objection has a certain legal significance, because, coupled with the premise that the contracting parties could never have intended to set up machinery incapable of working, it would lead to the conclusion that in the minds of its founders the League and the Members thereof were one and the same thing. But it is unnecessary to go into the question how far this reasoning would prevail against the objections to the delegation of power already referred to. The presence of an immediate subject, distinct from the States-Members, of the rights and obligations created by the Covenant and subsequent conventions does not doom the League to weakness. The League of Nations was established to perform tasks which would otherwise have been directly incumbent upon a small number of States. Their accomplishment would in any case have depended upon the reality of the interest in their being done. That interest will go at least as far in determining the supply of means to the League as it would have gone in inspiring the unco-ordinated action of one or more States. If there is any lessening of the sense of individual concern, it will be compensated

[1] See above, pp. 136, 138. It should be noted that the alleged delegated powers were in this instance exercised by a body on which the vast majority of the Member-States are not even represented.

[2] "Die konstruktiven Grundlagen des Völkerbundsvertrages" in Kohler's *Zeitschrift für Völkerrecht*, 1922, p. 11.

[3] Although it has sometimes been asserted by one and the same writer, for instance by H. Rolin in "Le système des mandats coloniaux" in *Revue de Droit international et de Législation comparée*, 1920, Nos. 3 and 4, pp. 334–6, that the League is nothing more than its Members and yet that it has no power to enforce its decisions. It is difficult to see how these two statements are to be reconciled

by the widening of the indirect incidence of responsibility, by the constant attention and control of an impartial central organism and by the organized force of opinion.

The League of Nations, as the subject of rights and duties distinct from those of its Members and recognized by the vast majority of civilized countries, is a person of international law. What remains is to determine its place among the unions of States.

The sphere assigned to it in the conduct of international affairs is too wide to permit of relegating it, as some authors would desire,[1] to the class of *Zweckverbände* exemplified by the Universal Postal Union, the Telegraph Union, and the International Institute of Agriculture. Both in the variety and in the nature of its tasks, it differs essentially from these purely administrative and technical organizations. Under Article 24 of the Covenant the bureaux of such organizations may indeed, with the consent of the interested parties, be placed under the direction of the League as one minor phase of its activity.

If we accept as sufficient Jellinek's definition,[2] the League of Nations, being indisputably a permanent contractual union of independent States having for its principal object the preservation of peace and protection against aggression, and possessing a permanent organization for the realization of these ends, is a confederation. Jellinek does not indeed concede personality to such unions, regarding them rather as associations *zur gesamten Hand*, but the personality of the League will not constitute an obstacle to this classification for those who, recognizing the distinct rights and obligations of the confederation, are compelled to count it also among the persons of international law.[3]

The Covenant does in fact present certain striking resemblances to the various treaties of confederation. It contains the guarantee of independence and security which is common to them all, provides similar machinery for the settlement of disputes, sets up a Diet, stipulates contributions to expenditure, aims at the restriction of armaments attempted in the American Articles of

[1] See, for example, Makowski, article cited, p. 216.

[2] See above, p. 121, note 4.

[3] For the contrary view see Jellinek : *Allgemeine Staatslehre*, ch. xii, § 4 ; Anzilotti : *Corso di Diritto Internazionale*, pp. 97 *et seq.* For the affirmative see, for instance, Chrétien, *op. cit.*, p. 417 ; Merignhac, *op. cit.*, Vol. I, p. 187, Vol. II, p. 25 ; Lapradelle : *Cours de Droit Constitutionnel*, p. 50 ; Bonfils-Fauchille : *op. cit.*, Vol. I, pp. 241 *et seq.*

1778, prohibits the conclusion of treaties inconsistent with its terms. But the powers of the League are undoubtedly more restricted than were those of the American Confederation under the Articles of 1778, the German Confederation from 1815 to 1866 or the Swiss Confederation from 1815 to 1848. In these three classical examples of the type, the Congress or Diet had a direct power of decision in matters which the Members of the League reserve to their constitutional authorities. To take the highest common factor, it could declare a war in which the States were bound to participate, possessed the exclusive power of making peace after such a war, had full exercise of a separate right of legation and could conclude treaties which the States were bound to observe. All three, being stages in the evolution of unitary States, were, in a word, marked by a greater subordination of their members than is the case in the League of Nations.

But the three precedents cited need not be taken as fixing definitely and finally the limits of the class confederation. The differences which have been noted, consisting in the degree of authority attributed to the central organization, are not sufficient to justify placing the League of Nations in a genus by itself. Its objects are, as we have seen, the objects of the confederation, generalized to secure the accession of the whole community of nations. Evidently it is easier for a few States already linked by geographical proximity, racial similarity, and common economic interest, to sacrifice a portion of their individual rights, while in general retaining their independence, than for fifty Powers separated by immense distances and conflicting needs, and representing all the races, to subordinate themselves to a common control. Every confederation has had peculiar characteristics corresponding to special features in the situation and mutual relations of its component parts. The League of Nations is but a looser species of the genus, established to comprise an indefinite number of self-governing political communities.

THE GROUNDS OF INTERVENTION IN INTERNATIONAL LAW

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In an earlier article,[1] the writer suggested that the essence of intervention is compulsion, actual or threatened, by one State against another, or against one or both of two disputant parties in another State ; and that intervention may be classified as : (1) internal, where it consists of interference between disputant sections of the community in another State ; (2) punitive, where it is a measure of redress falling short of war ; (3) external, where one State interferes in the relations of two or more States without the consent of all or any of them.

It was also pointed out that there is no real difference between war and external belligerent intervention, that the causes of the one are no more capable of exhaustive enumeration than are the causes of the other, and that they are not an appropriate topic of international law. Again, as punitive intervention is only a mode of redress falling short of war for some alleged international wrong, the grounds justifying it are co-extensive with all the possible breaches of international law. The causes of internal intervention, on the other hand, are always taken to be within the province of international law. In the present article it is proposed to discuss briefly the more important grounds on which intervention is said to be justifiable, and from what has been said above it is obvious that the analysis must be limited to internal intervention.

Of course there are justifications equally applicable to all three kinds of intervention ; for instance, those of self-preservation or the repression of illegal conduct on the part of a State. But each species is so essentially different in nature, that this identity must be regarded as an incident of the discussion of internal intervention and certainly not as exhaustive of the grounds which legalize external and punitive intervention.

[1] *British Year Book of International Law*, 1922–3, pp. 130–49, especially pp. 140–9.

As to some three or four justificatory causes, it is possible to pronounce a decided opinion; they are unquestionably sound. A large number of others can be rejected, either because they are relics of a time which modern practice has outgrown or because of their intrinsic weakness. But between these extremes there lies a tract of debatable ground where practice is still plastic, and theory, in consequence, contradictory.

Interventions have at one time or another been upheld by statesmen or jurists to support the balance of power; to settle a disputed succession; to maintain the existing order of things; to fulfil the duties of friendship; to secure perpetual peace; to protect reversionary rights; to recognize independence; to redress a breach of law or of treaty, a crime of a government against its subjects, the violation of individual rights or unneutral conduct; to check aggrandizement, propagandism or a menace to independence; to repress a civil war, general anarchy, political oppression, protracted revolution, public scandals or persecutions; to prevent the effusion of blood, general injury to other States, maltreatment of aliens, or prejudice to foreign commerce or interests arising from internal changes; in virtue of the approbation of all States, of the invitation of one of them or of a party within it, of treaty-right or of a "juste titre"; in compliance with the request of both parties to a struggle in self-defence; in self-preservation; as a homœopathic cure for intervention; on grounds of morality, humanity, nationality, necessity, policy, religion. According to some, its justification, like that of treason, lies in its success. Lastly, there are two views which would remove the necessity for any discussion whatever of this branch of the subject. The first, which, if it has no other recommendation, possesses that of honesty, is that the matter is so difficult that no rules can be formulated; the second assumes that non-intervention is an absolute rule and that there can therefore be no justification at all.

As a rule, interventions which are legally inexcusable have been defended by weapons whose weakness is scarcely discounted by their variety. Thus attempts have been made to justify the intervention which created the Kingdom of Greece on the grounds of self-preservation, nationality, morality, the right of succouring the weak and the danger to neutral commerce by piracy in the Levant.

The writers and statesmen who allow intervention the

greatest latitude are those who witnessed it most frequently.[1] Those who would narrow its application most are jurists whose countries have suffered most from it. Thus both before and after the Kingdom of Italy was created, Italian jurists argued in favour of absolute non-intervention.[2] .Roughly, however, from the period in which de Martens wrote, writers have striven to reduce the grounds of intervention to a scientific basis.[3]

It is proposed, first, to classify the justifications recognized by law, secondly to refute the most prominent of those which are unsound, and lastly to indicate the problems which still remain open.

I.—Legal Justifications.

(a) *Self-preservation.*

Every right conferred by international law exists subject to that of self-preservation. To state that the rule of non-intervention must yield to it might appear to be almost a work of supererogation. But it is necessary, even if the principle were conceded unanimously, to settle exactly what it includes.

It will be as well to consider first what is the precise meaning of self-preservation in relation to intervention.

"If," says Hall, "a government is too weak to prevent actual attacks upon a neighbour by its subjects, if it foments revolution abroad, or if it threatens hostilities which may be averted by its overthrow, a menaced state may adopt such measures as are necessary to obtain substantial guarantees for its own security."[4]

This represents not only international practice but the bulk of juristic opinion. Other phrases, which appear to be little more

[1] e. g., Kent: *International Law* (Ed. J. T. Abdy, 1866), p. 93, "The right of interposition . . . must depend upon special circumstances;" Wheaton: *History of the Law of Nations*, p. 759, "No general rules have been discovered by which the occasions which may justify the exercise of this right . . . can be laid down . . . it remains therefore an undefined and undefinable exception to the mutual independence of nations." Castlereagh, in his circular dispatch of 1821, could give justifiable interference no more exact scope than cases in which the "immediate security or essential interests" of the interfering State are compromised. Guizot was of much the same opinion (*Mémoires*, Vol. IV, p. 5); so was Chateaubriand when it suited his purpose: "On intervient ou l'on n'intervient pas, selon les exigences de son pays" (*Congrès de Vérone* (1838), pp. 312 *et seq.*).

[2] Mamiani (trans. Acton), Ch. XII; Amari: "Nouvel exposé du principe de non-intervention" in *Revue de droit international*, 1873, p. 370.

[3] As late as 1863 Sir William Harcourt regarded intervention as a question of policy rather than of law (*Letters by Historicus*, p. 41).

[4] Hall: *International Law*, § 91.

than variant forms of the same conception, are self-defence [1] and necessity.[2]

According to Hall, intervention to prevent internal changes in a State from prejudicing rights of succession or of feudal superiority falls under the right of self-preservation, provided that, at the time of the arrangement being made upon which the intervention is based, it was intended by both parties that in the contingency contemplated a union should be effected irrespectively of the form of government or of the persons composing the government of the State owning the succession. The protection of such reversionary rights might equally well be based upon treaty-right.

The theory of the balance of power is often discussed in connexion with intervention and self-preservation. Where it is relevant to intervention, it is so only as a justification of external intervention, the causes of which, as has been suggested elsewhere, are not capable of being catalogued by international law.[3] It is preferable to regard the balance of power as a principle of international policy, not of international law.[4]

The war between Revolutionary France and Great Britain in 1792 serves as an instance of an intervention lawful upon grounds of self-preservation. The English Cabinet was induced to express its disapproval of the form of government typified by the French National Convention mainly because it announced in effect to the world that there was but one Liberty and that France was her prophet. There was no intention, Pitt declared, if England had not been attacked, to interfere in the internal affairs of France.

There was a marked tendency after the Congress of Vienna in 1815 to regard popular demands for wholesome reforms as prejudicial to the existence of other States. Thus Austria, in 1831, stifled a revolt in the Papal States upon the very questionable ground that Austrian Lombardy was imperilled by the propagandism of the Papal insurgents. The French intervention upon the same occasion cannot, by the light of modern international law, be supported by any argument. The undercurrent

[1] Manning and Phillimore. [2] Klüber and Wheaton.

[3] *British Year Book of International Law*, 1922–3, p. 148.

[4] Cf. Charles Dupuis : *Le Principe d'équilibre et le concert européen*, 1909, Ch. VI. If I understand Oppenheim (*International Law*, I, § 136) correctly, his view is not inconsistent with that which I have adopted. See also Ellery C. Stowell : *Intervention in International Law*, 1921, § 17.

of disapprobation expressed by the author of the Annual Register for that year at revolutionary proceedings is one more proof of the swift progress of the rule of non-intervention during the last two generations.

The extension of self-preservation by Woolsey to include Mackintosh's defence of the intervention by England, France and Russia between Greece and Turkey, in 1827, upon the plea that "whatever a nation may lawfully defend for itself it may defend for another, if called upon to interpose," is no part of the present law relating to intervention.

The intervention in South Africa which resulted in the extinction of Boer rule there may, though the matter is much disputed, perhaps be justified on the ground of self-preservation. The views of the English Colonial Office are summarized in a despatch by Mr. Chamberlain to Sir Alfred Milner;[1] those of English jurists by Westlake in a sketch of the long history of events in South Africa contained in the *Revue de droit international*.[2] His conclusion was that it was not the duty of England to abandon or leave in peril the South African Empire which it had obtained by treaties, and that her justification was based on the protection of her possessions bordering on the Transvaal and not merely their protection against an ultimate attack.[3] Mr. Chamberlain had convincing proof of the danger to other British possessions in the petitions from them signed by a large proportion of the populations.[4] The broad, general view taken by Westlake makes it unnecessary to plead our case on such narrow grounds as the refusal of political rights by the Transvaal Government to the Uitlanders;[5] or the infraction of the Convention of London of 1884 by the Boers. M. Yves Guyot was of opinion that England was justified on this latter ground,[6] but M. de Louter was strongly against it.[7]

It is suggested that the ground of self-preservation is not unduly extended if it is made to include Westlake's justification for intervention in a country which has fallen into such anarchy or misrule as unavoidably to disturb the peace, external or internal, of its neighbours, whatever the conduct of its govern-

[1] *Parliamentary Papers*, 1899, LXIV, p. 608.

[2] 1900, p. 515 *et seq.*; 1901, p. 140 *et seq.*

[3] *Ibid.*, pp. 184, 187.

[4] *Parliamentary Papers*, 1899, LXIV, pp. 567, 633.

[5] Westlake: *International Law*, 1904, Part I, p. 211 (where such a claim is negatived).

[6] *Revue de Droit International*, 1899, pp. 451, 460.

[7] *Ibid.*, p. 321.

ment may be in that respect. It is on this principle that the interventions formerly undertaken by the Powers in Turkey and by the United States in Cuba must be judged.[1] The intervention of the United States between Spain and Cuba, which commenced in 1898, was inspired by several motives, some morally, some legally, justifiable. They are clearly summarized in President McKinley's Message to Congress as (1) humanitarian; (2) protection of American citizens in Cuba; (3) the injury to American commerce; (4) the constant menace to American peace from the feebleness of Spanish rule in Cuba. The last was regarded as the most weighty ground.[2]

On the whole, the opinion of other States was in favour of the intervention. If the abatement of such an international nuisance as the condition of Cuba had become was not self-preservation, it was closely akin to it. American subjects and property had been endangered for years in Cuba. Two million dollars had been spent by the United States in stopping filibustering expeditions. American relations with Spain had been fretted to the snapping point for more than a quarter of a century. And yet, in spite of all this, even the United States Congress considered that the intervention was favoured on grounds of necessity and policy as advocated by the Monroe Doctrine rather than by international law,[3] and it has been admitted by an American writer that the intervention was "far from being entirely unselfish."[4]

(b) *Checking Illegal Intervention.*

Intervention is justifiable if its aim is to check or to undo the effects of an illegal intervention on the part of another State. It seems immaterial whether the first intervention were legal or illegal. For the second intervention is an external one, though the first was internal.[5]

An example of intervention against intervention was the help afforded by Great Britain to Portugal in 1826. So far as it secured the existence of the Portuguese throne against the attacks of Portuguese subjects, it was an internal intervention and lawful

[1] Westlake: *op. cit.*, Part I, pp. 305, 307.
[2] *State Papers*, Vol. 90 (1897–8), p. 799.
[3] Callahan: *Cuba and International Relations*, pp. 487–8.
[4] Robinson: *Cuba and the Intervention*, p. 111.
[5] Westlake: *op. cit.*, Part I, p. 307.

upon the ground that it repelled Spanish aggression in the same direction.

The French intervention in Rome in 1849 is an instance on the other side of the line. It cannot be contended that it was justifiable as a counterblast to Austrian intervention in Italy, when the Romans, whom General Oudinot professed to assist, were at the throats of their protectors.

This justification has sometimes been expanded into the statement that intervention to check any breach of international law is legal.[1] Undoubtedly this is correct so far as it refers to external and punitive intervention, and, with necessary modifications, may be extended to the internal species. If, for example, a government in repressing rebellion, violates the rights of other States, they may, if reparation is refused, obtain it by interference.

(c) *Treaty-right.*

It has been bluntly asserted, and as categorically denied, that intervention is justifiable if based upon treaty-right.

If more serious attempts had been made to arrive at an exact idea of what intervention is, the division of opinion upon the validity of this ground might have been considerably lessened. Even then, the cardinal mistake is to imagine that its discussion is simple enough to bear dismissal in summary fashion. In fact, the variety of ways in which a treaty may affect inter-State relations and the restrictions upon the contractual capacity of the parties make it essentially complicated.

It will be as well to settle first in what, if any, sense treaty-right is applicable to external and punitive intervention. We shall then have the field clear for internal intervention.

Reverting to the definition of external intervention,[2] it is obvious that this is only possible if the consent of both disputants (usually both belligerents) be absent. If, therefore, a third State interfere under a treaty concluded at any time with even one of them—and it is perfectly within its rights in doing so, unless it is countenancing an obvious breach of law, or meddling on frivolous grounds—this is not intervention. It merely elects to forsake the status of neutrality and to assume that of belligerency. No doubt this view of the subject is modern. Such

[1] Bluntschli: *Das moderne Völkerrecht*, §§ 472, 478.

[2] *British Year Book of International Law*, 1922–3, p. 146.

interference has been regarded as intervention, but justifiable upon the ground of treaty-right. And we can infer that Gericke did not go so far as this from the fact that even where a treaty of alliance existed, he ignores it and attempts to base the intervention upon some other ground, e. g. that of maintaining the balance of power. But a change is evident in the diplomatic papers relating to the Crimean War, 1854–6.[1] With two exceptions [2] there is no hint there that Russia regarded the act of Great Britain in allying herself with Turkey, or of Sardinia in allying herself with Great Britain and France as an intervention.

As to punitive intervention, its essence is violence or the threat thereof. It would therefore be futile to look for a treaty expressly providing for it as between the intervener and the State interfered with. But as the breach of a treaty may, if it is sufficiently serious, be redressed by war, in the last resort, and *a fortiori* by any penalty less tremendous, punitive intervention may theoretically be implied as a sanctioning right in every treaty.

It is quite open for several States who find themselves unable to procure satisfaction for injuries sustained through the apathy or ill-will of another State to conclude a treaty providing for punitive intervention in some form or other. Such was the case in the joint intervention of England, France and Spain in Mexico in 1861.

The opposing views as to the effect of a treaty upon the legality of internal intervention can be traced ultimately to a dilemma rooted in two competing principles. The first is that intervention of this kind is forbidden by law and it must therefore contaminate any international contract providing for its application. According to the second, a State may abandon any portion of its independence and may therefore invest another with the right of interfering in its internal discords. So far are these principles from being irreconcilable that, if rightly understood, they limit one another and yield tolerably definite results.

The first point for determination is the sense in which international law prohibits intervention. As far as any distinction is drawn in the authorities, it might be upon precisely the same footing as slave-trading. Both are illegal, but there are degrees of illegality, and while a treaty allowing intervention is in certain

[1] *Eastern Papers* (1854), Vol. LXXI.
[2] *Ibid.*, p. 360 ; Part VII, p. 46.

cases permissible, no bargain which sanctions slave-trading ever can be. Every State is under an international duty not to take part directly or indirectly, by concessions to its subjects, in human traffic. To do so is an international crime and a breach of an absolute duty, the right corresponding to which may be said to reside in the whole body of States.

On the other hand, every State is under an international duty not to perpetrate an internal intervention in its neighbour's affairs, save in the excepted cases ; a corresponding right of not being interfered with resides in every other individual State. But the right may be released, for it is peculiar to each State and not resident in the members of the international circle collectively.

In short, slave-trading is always obnoxious to international law, whereas intervention is objectionable but not under special circumstances. If the phrase may be allowed, the former is absolutely illegal, the latter relatively illegal.

The extreme form of argument to the contrary proceeds upon the assumption that there is an international duty of self-preservation. It is submitted that such *dicta* as exist in favour of this view are sound neither upon principle nor in practice, and are either explicable upon other grounds, or are not maintained consistently by those who utter them, or are bare assertions unsupported by usage.[1] If an individual must not commit suicide, a State may. It remains to consider the exact bearing of this upon a treaty which is alleged to vest the right of intervention in another State.

Bearing in mind that internal intervention is interference between two disputant sections of a community, such a treaty may provide, firstly, for immediate intervention, i. e. it may be concluded between one of the disputants in an actual struggle

[1] Vattel (*Le Droit des gens*, Liv. I, § 16) speaks of such a duty, but only as a moral one owed by the State to its citizens. *Ibid.*, § 194, is conclusive against any wider interpretation of the earlier passage. Heffter (*Das europäische Völkerrecht*, § 83) objects to a treaty irrevocably stripping a State of its independence, but in § 24 admits that a State may be extinguished by subordination to another. Hautefeuille (*Des droits et des devoirs en temps de guerre maritime*, I, p. 9) is against such a treaty. So too Mamiani (trans. Acton), p. 20. Twiss (*Law of Nations*, Vol. II, §§ 2–3) seems to go no farther than Vattel. On the other hand, Phillimore (*International Law*, Vol. I, §§ cxxiv–cxxv) and Hall (*op. cit.*, §§ 29, 116) are against the existence of any duty of self-preservation. Usage is to the same effect, except that if the abandonment by a State of the whole or a portion of its independence should involve a rearrangement of the map of Europe or America, European States in the one case and the United States in the other are respectively entitled to be heard in the matter.

and a foreign State, which thus becomes an ally against the other disputant. Whatever may have been the international practice and juristic opinion of the past,[1] no treaty of this kind can be lawful now, because it would be made without even the acquiescence of a considerable number of the citizens with reference to that particular subject.

But, secondly, a treaty may be the avenue for future intervention, i. e. at the moment of its conclusion, the internal economy of the State subsequently interfered with is normal. Disputes afterwards arise which are alleged by the intervener to constitute the *casus interventionis* contemplated by the treaty. Such contracts, within certain limits, legalize the intervention. They may obviously be a heavy fetter upon the liberty of action ordinarily possessed by a State, and this probably accounts for their violent denunciation in some quarters. Perhaps the most cogent reply is the truism that a treaty is better honoured in its observance than its breach. A portion of the powers of sovereignty is alienated by the representatives of a people with at least their nominal consent. Why should the agreement be illegal directly an opportunity for its application arises ?

The provision for future intervention is either express or, more commonly, implied, and in either case must take effect as the secondary or sanctioning right necessary to secure the maintenance of the rights and duties conferred or imposed by the treaty.

Examples of treaties containing such provisions are the Treaty of Kutschuk Kainardji, 1774, which gave Russia the express right to make representations at Constantinople on behalf of the Christian inhabitants of the Danubian provinces and also bound the Sultan to observe certain conditions in his treatment of the Greek islanders ; the Treaty of Bucharest, 1812, between the same Powers, with reference to Servia ; the Treaty of Unkier Skelessi, 1833, which gave Russia the right to intervene between the Porte and Mehemet Ali.[2] Several articles (e. g. 61, 62) of the Treaty of Berlin, 1878, provided for intervention contingently, and the convention between Austria and the Porte based upon Article 25 permits forcible meddling by the

[1] Vattel : *op. cit.*, Liv. II, §§ 54, 196–7. Cf. the debate in the House of Commons in 1835 on the Quadruple Alliance (*Parliamentary Debates*, Third Series, Vol. XXVIII, pp. 1133–63). If the action of England was questionable then, it was still more so in 1847 in the intervention to keep Queen Maria on the Portuguese throne.

[2] Cf. *State Papers*, Vol. 24 (1835–6), pp. 1290–2.

former in the regulation of its occupation of Bosnia and Herzegovina.[1] The Treaty of Havana, 1903, and the Treaty of Washington, 1903, gave the United States rights of intervention in Cuba and Panama respectively. It is perhaps to treaty rights of this kind that we must refer the intervention of Great Britain, France and Russia in Greece in 1916–17.[2] As is pointed out elsewhere in this volume, the Treaty of Versailles endows the League of Nations with a right of intervention in several cases.[3]

There has been a tendency to separate treaties guaranteeing a particular dynasty or form of government from other treaties providing for intervention. Such treaties may be unwise politically but do not appear to be logically distinct from the genus.[4] They were sufficiently common in time past, and their frequent evasion excited the remark of Frederick the Great that guarantees were like filigree-work—better to look at than to use—a witticism to which its author's robbery of Silesia from Austria, in contempt of the Pragmatic Sanction which Prussia had guaranteed, lent additional point.

Lastly, two or more Powers may conclude a treaty, as between themselves, providing for their internal intervention in another State. It is scarcely necessary to say that if the intervention is not otherwise righteous, a compact to carry it out is as much a crime in international law as a bargain to do an absolutely illegal act would be in municipal law.

The conclusion is that nothing is conveyed by the bald statement that treaties do or do not legalize intervention. A clear knowledge of the parties between whom, and the circumstances in which, the compact was made is necessary.

II.—Unsound Grounds of Justification.

These are numerous, but many of them are too antiquated or too flimsy to require any elaborate rejection. Thus the bare invitation of one of the parties to a quarrel can no longer sanctify internal intervention ; though it is doubtful whether the contrary view might not have been supported by the frequency of its

[1] de Martens : *Nouveau Recueil général de Traités*, Series VI, Vol. IV, p. 422.

[2] Discussed by the writer of this article in his edition of T. J. Lawrence : *International Law*, § 64.

[3] p. 136.

[4] Cf. Oppenheim : *op. cit.*, I, § 135 (5) ; Hall : *op. cit.* § 93. Ellery Stowell (*op. cit* § 19) is too dogmatic on the subject of treaty rights.

adoption during the period in which State independence was gradually forming the bed-rock of international law.

Two grounds which have acquired notoriety from the persistency with which they have been alleged are (*a*) nationality and (*b*) religion.

(a) *Nationality.*

As to nationality, the arguments based upon it present themselves in two distinct forms.

(i) Where the interveners are of a nationality identical with that of the party for whose benefit they intervene. Such was the intervention of Victor Emanuel and Garibaldi in Sicily in 1860. Even as international practice stood then, this was perhaps only morally justifiable. In one sense, it was a striking vindication of the general doctrine of non-intervention, for it would never have been necessary if for forty years previously Austria had not refused to let the States in the peninsula live their own life.

(ii) Where the grievance is not that there exists such an identity as between the interveners and the party, but that it is lacking as between the latter and the State of which it forms a constituent part and from which it seeks violently to dissociate itself. A fair statement [1] of the doctrine is Dr. Bluntschli's—that it becomes necessary to intervene in the name of international law when nationalities which have not an assured position in the State are oppressed by the latter in contempt of the laws of humanity. Two of the most serious objections to its admissibility are :

(*a*) If it were accepted, war might be raised in every corner of the world in its vindication. Any State might assist in wresting Ireland from Great Britain ; Madagascar from France ; or the Philippine Islands from the United States of America.

(*b*) It is problematical whether a single one of the above interventions would, all things considered, benefit any of the assisted races, much more whether the remote and doubtful good to be derived from them would outweigh the evils of what must almost certainly prove a long and bloody struggle.

Moreover, why should not the principle be carried to its logical conclusion ? It is granted that it may be applied for

[1] Italian jurists of the last century put it too strongly. Mamiani : *op. cit.*, p. 144 ; Amari in *Revue de droit international*, 1873, pp. 540, 552, 556.

riveting identical nationalities into an independent State. Why not, therefore, to prevent them from starting asunder? Why not interfere on the side of a government whose subjects are of homogeneous origin but yet break into revolt?

(b) *Religion.*

Here, again, what was once a well-recognized justification, while religion was a burning question upon which medieval Europe permitted no compromise, has become obsolete. Vattel, de Martens, Heffter, Bluntschli, and Phillimore allow intervention with more or less qualification upon this ground, while it is unhesitatingly condemned by Mamiani and Amari.

It is difficult to abstract this ground from that of humanity, as the bitterness of feeling which accompanies the former invariably leads to outrages on the latter. But mere religious persecution cannot now justify an intervention. Some other prop is sought, and often found in treaty right.

III.—Alleged Grounds of Justification as to which International Practice is uncertain.

It is extremely difficult to say whether justifications of this kind are or are not part of the international system, though they can generally be proved inconsistent with the fundamental principles upon which it rests. The most conspicuous of them are (i) humanity and (ii) collective intervention.

(i) Suppose the prosecution or suppression of civil strife to be accompanied by punishment and tortures that revolt the moral sense of other States, have they a right to intervene in the name of humanity? Of the varying opinions as to the legality of this ground, that of Amari reaches an extreme in rejecting it on the assumption that it is impossible to imagine any nation persistent in evil-doing.[1] Halleck, following Phillimore, strikes an arguable medium in allowing it as accessory to other grounds but not as a substantive and solitary justification.[2]

The particular case thinly concealed behind most of the generalities concerning humanitarian intervention is that of Turkey. It is necessary to recollect this, because the discussion of humanitarian intervention has become so bound up with

[1] *Revue de droit international*, 1873, p. 531.
[2] Halleck: *International Law*, I, XVI, § 21.

atrocities in the Near East that it may be doubted whether it would have been quite so freely admitted by its supporters in the case of barbarities incidental to internal disputes in any other State.

The case in which it is least likely to be abused is where the majority of leading civilized States exercise it collectively. But whether it is legal, even in this modified form, must in the present state of practice be regarded as an unsolved point.[1]

(ii) The only plea that can be certainly put forward for collective intervention is that it usually excites less disapproval than individual intervention, because it is less likely to be selfish. Whether, beyond this, there can be claimed any continuous practice in its favour, or what is approximately the limit of number of interveners, or how far their numerical inferiority is outweighed by their individual influence, or what, if any, other moral ground must be present—all this is unsettled. This much at least can be said : even if a particular intervention secures the concurrence of every civilized State, it is not necessarily justified, for the basis of any rule of international law is usage, not collective consent to a course of action on some isolated occasion. Mr. P. E. Corbett has happily anticipated much of what might have been said in this article on the superiority of intervention by the League of Nations over the collective intervention of States.[2] It has the clear legal justification of being based on treaty right, and the great political advantage of being untainted by suspicions of unworthy motives. Mr. Corbett notices the various treaties of 1919–20 which "secure equitable treatment of racial, linguistic and religious minorities," and place the guarantee of the clauses providing for it under the League of Nations. We have far to go yet, but the Treaty of Versailles gave tangible shape to something of which men only dreamed in the nineteenth century.

[1] See M. Rolin-Jacquemyns in *Revue de droit international*, 1876, p. 673 *et seq.*

[2] See pp. 119–148 of this volume.

STATE SUCCESSION IN MATTERS OF TORT

By SIR CECIL J. B. HURST, K.C.B., K.C.

During the recent London session of the Claims Commission which is hearing and deciding the outstanding pecuniary claims between Great Britain and the United States, a decision of considerable importance in connexion with State Succession was given. It is a point which does not seem to have come before an international tribunal on any previous occasion, and a definite ruling on it is very welcome, as the subject is one on which the writers of text-books have indulged in a good deal of unconvincing speculation.

An American citizen of the name of Brown suffered a denial of justice in the courts of the South African Republic: such is the fact as found by the arbitration tribunal at the hearing. The decision of the tribunal is printed at page 210 of this volume and gives the history of the case at length. It is worth reading, as it was on account of the first decision in Brown's case by Chief Justice Kotzé and his colleagues that there sprang up the great struggle between President Kruger and the Chief Justice which led to the dismissal of the latter and the passing of the notorious "Law I" of 1897. This was the law which was regarded at the time as destroying the independence of the judiciary of the South African Republic and thereby depriving the "Uitlanders" of the Transvaal of the last hope of fair dealing at the hands of the Boer Government.

The war between Great Britain and the two republics in South Africa broke out before the Government of the United States had made any diplomatic representations on Brown's behalf. At the end of that war the two republics disappeared and their territory was annexed by Great Britain. When the convention setting up the commission to deal with the pecuniary claims outstanding between Great Britain and the United States of America was concluded in 1910, a claim by the United States on behalf of Brown was included among those to be disposed of in the arbitration.

The Memorial filed by the United States Agent in 1913 in support of Brown's claim described the claim as one arising out of a denial of justice in the courts of the late South African Republic, but put it forward as a valid claim against Great Britain upon the ground that the conquest and annexation of the Transvaal imposed upon Great Britain liability to pay it.

The Memorial contained no arguments and quoted no precedents in support of the proposition that liability for this international wrong which had been suffered at the hands of President Kruger's Government had passed to the British Government on the annexation of the territory. It merely asserted that—

> " Inasmuch as Great Britain has acquired the entire and complete territory of the South African Republic by conquest, and has succeeded to and holds the full and entire sovereignty thereof, thereby replacing and substituting itself for the South African Republic which has by such acts wholly ceased to exist, Great Britain is bound to pay the debts of the defunct Republic, and especially so when such debts are in the nature of judgment debts. Furthermore, Great Britain is bound to meet and discharge the legal obligations of said defunct Republic, particularly when they arise out of and are connected with the tortious taking or deprivation of real estate or interests therein, and when the illegal possession resulting from such tortious taking or deprivation has been confirmed by and protected under the sovereign authority of Great Britain."

The reference to a " tortious taking or deprivation of real estate " is to be explained by the fact that the contentions put forward on behalf of Brown were that the decision in the South African courts had deprived him of certain valuable mining claims in the Transvaal.

No authorities were quoted in support of the proposition quoted above. It was left to speak for itself. Nor was the language employed in this paragraph very appropriate to a claim for compensation based on a mere denial of justice in the courts. In truth the United States Agent found himself a little embarrassed by the difficulty of maintaining that liability for wrongful acts passed on the annexation of territory to the annexing State, and the wording of the passage quoted above is probably due to a desire to convert Brown's claim for compensation or damages into a claim for certain specific mining claims. Under the finding of the court Brown had only a claim for damages for failure to obtain prospecting licences through the use of which he hoped and expected to obtain certain mining claims. Had it been possible to maintain that Brown was entitled to mining licences on certain definite areas of land, there

would have been some ground for treating them as *property rights* of which he had been deprived and which an annexing State was bound to respect.

The British Answer to the Memorial took up the challenge and dealt at great length with the question whether liability for wrongful acts committed by the former Government passes to a State annexing the territory. All the material which could be found was collected and set out in order to show that the proposition that liability passed in such circumstances was unsound, that the rules of international law embodied no such principle and that it would be contrary to justice and to reason.

At a later stage the United States Agent slightly changed the ground on which he urged Brown's claim before the tribunal and based Great Britain's liability on two propositions: firstly, that after the annexation the British officials had by their own acts rendered the British Government liable; and secondly, that at the time of the occurrences giving rise to the claim, Great Britain was the suzerain of the Transvaal and should, therefore, have interfered to prevent any such miscarriage of justice.

Both these contentions were overruled by the tribunal, but the effect of the change in the line of argument adopted by the United States Agent in support of the claim was that the original contention is not considered at length by the tribunal in its decision. It is merely dismissed in one sentence:

> "Passing to the second main question involved, we are equally clear that this liability never passed to or was assumed by the British Government."

Nevertheless from the point of view of international law, the case shows that liability for the torts of the Government of a former State does not pass to a State conquering and annexing its territory.

The two hundred pages of the British Answer which deal with this issue of State Succession as it arose in Brown's case afford so complete a collection of all the available material which bears on the point that it will be useful to describe it in some detail. Some of the material had not previously been published and is therefore of particular importance.

The British Answer dealt first with the practice adopted by States on the occasions when territory was annexed by a unilateral act; then with the decisions given in municipal courts in analogous circumstances; thirdly it commented on the writings

of the text-book writers; lastly it dealt with the subject on broad questions of principle.

I.—Practice of States in Similar Circumstances.

The territories of the former Boer Republics were annexed by Great Britain after the South African War without the conclusion of any treaty providing for their cession. In the course of the second half of the nineteenth century there had been five instances of the annexation of the entire territory of another State without any treaty providing for its cession, instances, that is, closely resembling the annexations which ensued after the Boer War. All the papers contained in the archives of the British Foreign Office with regard to these five instances had been examined and failed to show a single case where the annexing State had undertaken liability for claims for damages based on the wrongful acts of the former Government of the territory.

The first instance consisted of the group of Italian annexations in 1860, when the various independent States constituting the provinces of Emilia (Bologna, Ferrara, Forli, Massa and Carrara, Modena, Parma, Placentia, Ravenna and Reggio) were annexed to the Kingdom of Sardinia, followed later by the annexation of Naples, Sicily, Umbria and the Marches.

These annexations were not the result of conquest but followed on a popular vote in the territory in favour of union with Sardinia, and also upon popular risings which had overthrown and displaced the ruling houses.

The decrees annexing Emilia and Tuscany were very simple in form. The text will be found in Volume 57 of *State Papers*, but it may be worth while to quote one of them in full.

"Victor Emanuel II, King of Sardinia, of Cyprus and of Jerusalem, &c., Duke of Savoy and of Genoa, &c., Prince of Piedmont, &c.

Considering the result of the universal suffrage of the Emilian provinces, proving their unanimous desire to be united to our State;

Having consulted our Ministers, we now decree:

Art. I. The provinces of Emilia shall make an integral part of the State from the day of the date of the present Decree.

II. The present Decree shall be presented to Parliament to be converted into law.

Our Ministers are charged with the execution of the present Decree, which, furnished with the seal of State, shall be inserted in the collection of Government Acts and be published in the provinces of Tuscany.

Given at Turin, March 18, 1860.

VICTOR EMANUEL.

The later decrees for the annexation of Naples, Sicily, Umbria and the Marches were in a slightly different form, as in the meantime the Italian legislature had passed an enactment enabling the King to annex the territories in cases where a plebiscite had indicated the desire for incorporation in Italy. The text of the decrees as to Sicily, Naples, &c., will also be found in Volume 57 of *State Papers*. It will be noticed that the decrees contain no undertaking by Sardinia to meet claims against the Governments of the territories annexed, and a statement by the Librarian and Keeper of the Papers at the Foreign Office figured in the British Answer in the Brown case to the effect that in the archives of the Foreign Office there were no reports by British diplomatic representatives nor any information from other sources tending to show that claims for compensation based on wrongful acts of the Governments of the annexed territories were paid by the Italian Government.

The second group of annexations consisted of the Prussian annexations in 1866 and 1867, comprising Hanover, Hesse-Cassel, Nassau and Frankfurt, and later that of the Duchies of Holstein and Schleswig. The papers relating to the annexations of Hanover, Hesse-Cassel and Nassau are to be found in Volume 56 of *State Papers* and consist of a message from the King of Prussia to the Landtag inviting that body to sanction the contemplated union and transmitting the draft of a law for the purpose, with a statement of the reasons in favour of its enactment, all dated August 16, 1866, a decree of the King of Prussia for the same purpose, dated September 20, 1866, and a series of patents, dated October 3, for the taking possession of the various territories.

On December 24, 1866, a law was passed by the Landtag for uniting the Duchies of Holstein and Schleswig to Prussia, and on January 12, 1867, a patent was issued by the King of Prussia for taking possession of the Duchies. The terms of these two instruments are similar to those in respect of Hanover.[1]

Beyond the statement contained in the patents :

> " We will protect everyone in the possession and enjoyment of his justly acquired personal rights, and leave the officials who are to be sworn into our service in the enjoyment of their salaries on condition of the faithful performance of their duties,"

[1] They are not printed in *State Papers*, but are to be found in *Gesetz-Sammlung*, No. 8, January to June, 1867 pp. 129 and 130.

there is nothing in these documents to suggest any assumption by Prussia of liability for the wrongful acts of the States annexed. The words "justly acquired personal rights" are scarcely wide enough to cover claims for damages arising out of failure of duty on the part of the State. The more natural meaning would be to limit it to proprietary rights. Without such limitation, the succeeding phrase about the salaries of officials is superfluous.

The statement by the Librarian and Keeper of the Papers that the Foreign Office records contained nothing to show that claims based on wrongful acts by the Governments of the States annexed had been paid by the annexing Government, covered the Prussian annexations as well as the Italian.

The next instance of annexation by a unilateral act is the annexation of the Transvaal by Great Britain in 1877. It is an exceptional case and as a precedent is not of great value, for the terms of the annexation were discussed beforehand with the President of the Transvaal, and though he felt bound *pro forma* to protest against it, most of his suggestions as to the terms of annexation were accepted. The case is, therefore, closely akin to that of the absorption of one State by another by cession.

The history of this annexation of the Transvaal in 1877 was that the emigrant farmers to the north of the Vaal river in South Africa, whose independence had been recognized by the Sand River Convention of 1852, formed themselves in 1858 into an independent State called the South African Republic. In 1876 the Republic embarked on a war with a powerful native chief called Sikukuni and found itself involved in such difficulties that the prestige of Europeans with the natives was impaired, and the peace and security of South Africa endangered.

In these circumstances Sir T. Shepstone was commissioned to investigate the situation and annex the territory if he thought fit, but only if he was satisfied that the inhabitants, or a sufficient number of them, desired to become British subjects. Accordingly, Sir T. Shepstone went to Pretoria and, after careful investigation, annexed the Transvaal on April 12, 1877.[1]

The text of the Proclamation will be found in Volume 68 of *State Papers*.[2] It is a long document and contains a full account

[1] Full information with regard to the annexation of the Transvaal will be found in the Blue Books: *Native Affairs in South Africa*, 1877 (*Cd.* 1776); *South Africa*, 1877 (*Cd.* 1883); and *Affairs of South Africa*, 1878 (*Cd.* 2144).

[2] p. 140.

of the reasons which indueed Sir T. Shepstone to issue it. It also embodies a series of stipulations for the benefit of the inhabitants of the annexed territories. From these it may be well to quote two paragraphs :

" All private *bona fide* rights to property, guaranteed by the existing laws of the country, and sanctioned by them, will be respected. . . .

" All *bona fide* concessions and contracts with Governments, companies, or individuals by which the State is now bound, will be honourably maintained and respected, and the payment of the debts of the State must be provided for."

This language is not wide enough to cover unliquidated elaims for damages based on wrongful acts of the Government of the annexed territory.

Prior to the proclamation of annexation some discussions took place between President Burgers and Sir T. Shepstone as to the conditions. Questions were put by the President and the Executive Council of the Republic, and answers by Sir T. Shepstone were sent to them. The Council in turn either adopted the answers as they stood or suggested amendments in which Sir T. Shepstone seems to have coneurred.

4. Q. Will the debts of the State be guaranteed ?

A. All the just debts of the State will be guaranteed.

5. Q. Will all obligations of the State as defined in treaties with foreign Powers, and contracts and concessions to companies and individuals, and the construction of the Delagoa Bay Railway be maintained ?

A. Being unaware of the nature of the treatics which subsist between this State and foreign Powers, or of the terms of the contracts with and concessions to companies and individuals, it is impossible to say more than that all *bona fide* concessions and contracts which are not prejudicial to the interests of the country will be maintained, and that treaty arrangements with foreign Powers will have to be considered with reference to the altered circumstances of the country. The Delagoa Railway is a question which appears to be at present under the consideration of the contractors, and must be decided upon with reference to pending negotiations, it being understood that the interests of the country demand every exertion to be made to secure its construction. All contracts entered into on the part of the Government with the Portuguese Government and the Lebombo Company with regard to the railway line and the extension thereof shall be respected and carried out.

8. Q. Will all private rights of property be respected ?

A. All private *bona fide* rights to property guaranteed by the existing laws of the State and sanctioned by them will be respected, except of course in cases where the owners of such property offer, or induce others to offer, seditious opposition to Her Majesty's Government. In this, as in all newly settled countries, there are, however, questions of right to land which cannot be brought under the operation of any general principle and which can therefore be decided only on their special merits.

It will be noticed that there is not a word in these questions or answers which covers unliquidated claims for damages for wrongful acts on the part of the State.

After the annexation had been completed, the Imperial authorities in London sent out a Mr. W. C. Sargeaunt to investigate the finances of the former Republic, and the debts owing by it and the claims against it. The reports made by Mr. Sargeaunt [1] show that all *bona fide* claims were met with extreme liberality out of moneys provided by the Imperial Parliament. There were strong grounds of expediency in favour of the generous financial treatment of the annexed territory. The chief purpose of the annexation was the re-establishment of a strong Government at Pretoria, and as it was the weakness of its financial position which had undermined the position of the Republic, it was natural that financial help on a liberal scale should be provided. Nevertheless, Mr. Sargeaunt's reports fail to disclose any instance of the payment of an unliquidated claim for damages based on a wrongful act on the part of the Republic.

The instances given so far only afford evidence of a negative character, i. e. they fail to show any instance of the payment of claims of this character, or any demand by a foreign State on behalf of one of its nationals for the payment of such claims.

The fourth instance of territorial annexation to be considered affords more positive evidence in favour of the view that there is no rule of international law imposing liability in such cases on the annexing State. The instance is that of the annexation of Burma by Great Britain in 1886 after the war against King Theebaw.

Numerous claims were put forward by British subjects and by other foreigners against the former Government of Burma. All these claims were carefully investigated by the Government of India after the annexation, and though the reports and despatches on the subject have never been published, their contents were made accessible for the purpose of the argument of the Brown claim before the Pecuniary Claims Tribunal.

The new Government installed in Burma after the war made a careful investigation of all claims, and a tabular report was forwarded to the Government of India and in due course transmitted to the British Government in London. This report enables the details of each claim to be seen, and discloses the

[1] These will be found in *Affairs of South Africa*, 1878 (*Cd.* 2144).

fact that there were certain claims for compensation put forward by foreigners in respect of wrongful acts for which there had been a good case for holding King Theebaw's Government responsible.

The first is that of Signor Fea, an Italian naturalist, who was making a collection in Upper Burma for the Genoa museum. His property, specimens and scientific apparatus, were on board a steamer which was seized by the Burmese Government during the war, and the property was all either lost or destroyed by agents, or in consequence of acts of agents, of the Burmese Government.

The Government of India declined to admit any liability, but while the case was still under consideration they authorized, as an act of grace, an advance of Rs. 1,000 to Signor Fea. Signor Fea's claim was pressed by the Italian Consul-General at Calcutta, but no further payment was made beyond the *ex gratia* grant, and no liability was admitted. The Italian Government appear to have acquiesced in the decision.

Another claim was that of Messrs. Rey (a French citizen) and W. Calogreedy (a Eurasian). These men were traders and when the war broke out they were arrested and imprisoned by the Burmese ; their property was seized and destroyed, and they were compelled to pay certain sums to secure the favour of their jailors. The Government of India declined to pay compensation.

Another claim in which a French citizen was interested was that of a Monsieur d'Avera who claimed Rs. 15,000 on the ground that he had been wrongfully deprived of a house by the Burmese Government. The Burmese Government had declined to entertain the claim, and the Government of India refused to go behind the act of state of the Burmese Government or to admit any liability.

The Government in London upheld these decisions. Though correspondence took place in 1887 between the French and British Governments with regard to the claims of French citizens against the Government of King Theebaw, the French Government appear to have acquiesced in the rejection of the claims.

Claims by two American missionaries, Rev. J. A. Freiday and Rev. W. H. Roberts, afford another example. Both these gentlemen claimed compensation for property belonging to themselves and to the Mission of which they were in charge when the town of Bhamo was taken by the Chinese and Kachins at the end of 1884. Some of the damage was undoubtedly done by the Kachins and the Chinese, but most of it was the wanton act of the

Burmese soldiery when they recaptured the town. As against the Burmese Government the Chief Commissioner considered that the claims were good, and in view of the nature of the work in which the missionaries were engaged, he recommended that the claims should be paid *as an act of grace*. The Government of India rejected the claims and declined to pay anything, and the British Government in London upheld this decision. The Government of the United States made no protest and acquiesced in the rejection of the claims.

It will thus be seen that the claims put forward after the annexation of Burma afford three instances in which important foreign Governments acquiesced in the rejection by the annexing State of claims for compensation based on wrongful acts on the part of the Government of the territory annexed. All three cases were those of valid claims against the former Government. As precedents these three cases were directly in point in support of the British contentions in the Brown claim.

The last instance of annexation by a unilateral act was that of Madagascar. It was annexed by France and declared a French colony in 1896, after a military expedition had been sent to the island and had occupied the capital. Madagascar had previously been a French protectorate. The French law declaring Madagascar a French colony [1] contains no provision for the recognition by France of claims then existing against the Malagasy Government, and it is stated in the British Answer in the Brown case that the British Government had no information to show that the French Government had ever recognized liability for unliquidated claims for damages based on the wrongful acts of the previous Government.

The precedents drawn from the instances of annexation quoted above exhaust the material which can be said to possess any real authority, as these alone indicate the practice of States in circumstances similar to those which occurred on the annexation of the territories of the two Boer Republics. Instances of the absorption of one State by another as the result of agreement between the two States, such as that of Corea by Japan,[2] or as the result of independent action by each party without a formal agreement, such as the admission of Texas to the United States on December 29, 1845, are not in point. Such absorption may

[1] The text will be found in *State Papers*, Vol. 89, p. 486.

[2] Treaty of August 22, 1910. (*State Papers*, Vol. 103, p. 992).

or may not result in the annexing State shouldering responsibility for the claims ; it does not in any case exclude the absorbed State itself remaining liable. All that happens is that the channel of diplomatic relations by which a third State approaches the absorbed Government is altered. An interesting opinion by Attorney-General Griggs of the United States on the question of the continuing liability of the Government of Hawaii for certain foreign claims arising out of the abortive royalist rising at Honolulu in 1895 will be found in Volume 22 of the *Official Opinions of the Attorneys-General of the United States*.[1]

Similarly the cession of territory by one State to another affords no analogy. Liability for claims particularly affecting the territory transferred may or may not pass with the territory It will depend on the terms of the agreement of cession.

II.—Decisions of Municipal Tribunals.

The question of the liability of the annexing State for claims against the former Government of the territory has occasionally come before municipal tribunals for decision. Such decisions in national courts do not constitute precedents which possess any binding force before an international tribunal, but they help to throw light on the problem. The best-known case is that of *The West Rand Gold Mining Company* v. *The Queen*,[2] in the High Court of Justice in England, a case where underwriters of gold commandeered by President Kruger on the eve of the Boer War endeavoured to recover the value from the British Government after the annexation of the Transvaal. The Court held that there was no principle of international law by which, after annexation of conquered territory, the conquering State becomes liable, in the absence of express stipulation to the contrary, to discharge financial liabilities of the conquered State incurred before the outbreak of war.

Prominence is given by Professor Westlake in his treatment of the subject of State Succession [3] to the decisions given by the Italian courts in various suits which arose in that country. He seems to consider that very full effect has been given in Italy to the principle of State Succession and mentions the circular which was issued on August 16, 1860, by the Italian Minister of the Interior in pursuance of Article 8 of the Treaty of Zurich by which

[1] p. 584.

[2] L. R. 1905, 2 K. B. 391.

[3] *International Law* (1910), I, pp. 79–80.

the Italian Government undertook to consider compensation for the losses caused by requisitions made by the Austrians in Lombardy as a charge on the State. Professor Westlake mentions two decisions of the Court of Cassation of Florence, one in 1877 and one in 1896. No Italian case goes so far as to assert that liability to pay compensation for the wrongful acts of the former State passes to a State annexing the territory. Nevertheless it may be of interest to set out the Italian decisions which involved this question of State Succession.

The first is that of *Finzi* v. *Minister of the Treasury*. The facts out of which this case arose were as follows. In 1801 the Commune of Bozzoli was compelled by the military administration of the French army to give out a contract for the supply of provisions to the French troops in Lombardy. The contract was taken up by Finzi and the provisions were supplied. The price was settled by the Municipality of Bozzoli, not by the French Government, but was never paid. After the close of the Napoleonic era the Government of the Restoration in France undertook to pay the debts for military supplies outside its territory. By a treaty of April 25, 1818, it paid Austria twenty-seven millions of lire in order that Austria, after previous settlement of accounts, might pay the claimants for military supplies furnished in territories which were under Austrian rule. By an Austrian decree of August 27, 1820, the settlement of these debts was to be proceeded with through a committee instituted in Milan, but the powers of the committee were limited to the investigation and establishment of the debts. Lombardy was ceded to Italy in 1859 and at that date Finzi's claim had not yet been established, much less paid, and Finzi, considering that his claim now lay against Italy, instituted proceedings against the Ministry of the Treasury. The claim was disallowed. The Court of Cassation took the view that no definite liability had ever been established against the Austrian Government, and Italy could only stand in the place of Austria. Under its legislation Austria imposed a condition, and until this was complied with no debt arose, and Italy could only take over the rights and obligations as transmitted to it by the party ceding the same.

It will be noticed that this case dealt with ceded territory and not with liabilities alleged against a Government which had become extinct.

The second decision was that of the Court of Cassation in

Rome in 1885 in the case of *The Ministries of the Interior and of Finance* v. *The Commune of Capri*. The facts were as follows. One of the communes of the ex-Duchy of Modena had furnished supplies to the volunteers of the Provisional Government of 1848. The Government of Este when reinstated repudiated any liability. Modena was annexed by Italy in 1860 and suit was brought by the Commune of Capri to recover the amount of the expenditure from the Italian Government. The Court of Cassation held that as the previous Government had declined to admit liability, no liability accrued to the Government of Italy.

" Seeing that the reinstated Government of Este declared that it did not recognize that the Commune of Capri was entitled to be compensated for the supplies furnished by it to the volunteers of the Provisional Government, it will be clear to everyone that by the annexation of the Duchy of Este by the Italian State, an obligation to which even the late preceding Government was not subject in civil law could not be transmitted to that State. There cannot be any doubt that the Government of Este, being eminently absolute and despotic, by the fact of not acknowledging that it was bound as against the commune with respect to the above-mentioned claim, established in a judicial manner that the commune did not possess the legal right of action for claiming from the State the payment for the supplies : it is therefore equally evident that if it was not entitled to such action during the Ducal Government, it cannot acquire such right by the political reunion of the Province of Modena with the Italian Government which has taken place."

The next case was that of *Verlengo* v. *The Treasury* on July 21, 1878. The facts were that before the declaration of war in 1866 the Austrian commander at Verona ordered the cutting down of trees, &c., in the neighbourhood of the fortifications, and trees were cut down on land belonging to the plaintiff. On August 11 of that year a committee was appointed by the Austrian commander to investigate the claims for compensation and fix the amounts due. After the peace of October 3, 1868, the Italian Government by a decree of May 26, 1867, appointed a committee for the same purpose. Verlengo's compensation was fixed by this latter committee at 36,689 lire. The sum was not paid and Verlengo sued the Treasury. The Court of Appeal at Venice decided that the Italian Government was not liable to pay. The Court of Cassation at Florence reversed this decision and held that the Italian Government was liable. The court held that the Austrian Government was under obligation to pay compensation to Verlengo and that this liability had passed to Italy under Article 8 of the Treaty of Vienna.

The fourth case was a decision of February 19, 1881, in the case of *Traversi* v. *The Treasury*. The facts were that while Lombardy was still subject to Austrian sovereignty, the Austrian Government were the concessionaires for the construction of a railway from Milan to Como. By an agreement of January 19, 1859, certain lands were conveyed by the plaintiff to the Austrian Government for the purpose of this railway. By the terms of this instrument a right was reserved to the plaintiff to be refunded by the Austrian Treasury taxes on the said land which were levied on the plaintiff as the titular holder. By the Treaty of Zurich of the same year Lombardy was ceded by Austria to Italy. By Article 8 liability for contracts relating to the territory ceded passed to Italy, but by Article 10 of the same treaty the Austrian Government were to pay compensation due to contractors for railways, &c. Traversi brought an action against the Italian Government to obtain the refund of taxes in accordance with the above agreement, but the Italian Government disputed the claim on the ground that it fell within Article 10 and not within Article 8. The Court of Cassation (overruling the Court of Appeal at Milan) held that Traversi's claim fell within Article 8 and passed to Italy, and not within Article 10.

The next case was that of *Orcesi* v. *The Ministry of War*, a decision by the Court of Cassation in Florence on December 21, 1881. The facts were that in May, 1859, Orcesi supplied nine pairs of post-horses to the order of the Ministry of War in Parma. Three of them were returned after three days. On June 9 the reigning Duchess of Parma fled and on June 11 the Parma troops laid down their arms. The remaining six pairs of horses were then returned. They had been used for military purposes. The superior administrative authority of the ex-Duchy had admitted Orcesi's claim and had assessed it at 1,110 lire. It was not paid and Orcesi brought an action against the Italian Government, Parma having been incorporated in Italy by the decree of March 18, 1860. The Court of Cassation held that the Italian Government were liable to pay this sum.

It will be noticed that only two of the above cases, those of Capri and Orcesi, were instances where the Government originally responsible had disappeared through the annexation of its territory, and neither of them support the proposition that a State annexing territory is bound to pay unliquidated claims arising out of wrongful acts on the part of the Government

which is extinguished. In the Capri case the claim had been rejected definitely by an autocratic Government which was supreme within its territory. There was, therefore, no claim in existence at the time of the annexation. In Orcesi's case the claim had been admitted and had become a debt.

III.—Writers on International Law.

The text-books on international law afford very little help on the question of State Succession, particularly on the question as it arose in the Brown case, whether a State annexing after conquest the territory of another State becomes responsible for unliquidated claims for damages. In the writings of the older jurists but little stress was laid upon the question. In some more modern works there is a certain amount of speculation upon it, but the doctrines enunciated by the various authors are generally inconsistent with each other, a fact which, of itself, is sufficient to show the absence of any established rule of international law. Hall [1] admits that "The subject is one upon which writers on international law are generally unsatisfactory. They are incomplete and they tend to copy each other." Keith in his *Theory of State Succession*, published in 1907, collects [2] the various authorities which he could find bearing on the question of the liability of the successor for the torts of the predecessor. All the instances which he quotes and all the material which he collected deal with cases of the cession of territory from one State to another where the ceding State remains in existence and is able to fulfil any obligation resting upon it. Huber in *Die Staatensuccession* enunciates the doctrine in far-reaching terms, but admits that the rules he enunciates are seldom, if ever, observed in practice. Such a confession is a frank admission that the rules laid down are not established rules of international law, but merely the views of the writer as to the line which States ought to follow.

If the proposition advanced by some writers, that the sum total of the rights and obligations of the former State constitute an *hereditas* which passes to the new State, were true, it would not cover the case of liability for the wrongful acts of the former State, because under the rules of Roman law liability to an action *ex delicto* did not pass to the heirs.[3]

[1] *International Law* (7th ed.), p. 94, footnote. [2] pp. 74–7.

[3] "Actions which will lie against a man under either the civil or the pretorian law

IV.—Principle.

In reality there is no true analogy between succession to an *hereditas* and the acquisition of the territory and the property in such territory of another State by annexation and conquest. Conquest and annexation constitute an act of appropriation by force; the title of the annexing State is founded on might; the title to the property of the former Government rests upon the fact of physical control and the expressed intention to maintain it. Some property may never come within the power of the annexing State and to such property it gets no title. What the conqueror annexes is the territory of the former State, not the State itself, still less its Government. When once this principle is realized, it will be seen that in sound theory it is impossible to hold the conqueror liable for the torts of the Government which he has displaced, because the torts were the torts of the Government and not the torts of the territory.

A principle which would render a conqueror liable in damages for all the unliquidated claims based on wrongful acts of the State he is driven to subdue would be neither just nor reasonable, and would entail consequences which would be fruitful of mischief.

Such a principle would enable a small and backward State to withstand all pressure from a better governed and more advanced neighbour, and would act as a direct encouragement to any such backslider among the family of nations to render itself secure from intervention and absorption by perpetuating anarchy and misrule within its borders. The more the condition of such a State cried aloud for intervention for the sake of the inhabitants of the country, whether native or foreign, the more would neighbouring Governments be held back from necessary action by the contemplation of the burdens it might entail. In short, if there were any such rule of international law, it would merely set a premium on misgovernment.

It is fortunate that the tribunal has definitely laid it down that the liability in Brown's case never passed to or was assumed by the British Government, and thereby establishes the rule that the conquest and annexation of the territory of a State does not render the annexing State liable for the torts of the State which it has displaced.

will not always lie against his heir, the rule being absolute that for delict, for instance, theft, robbery, outrage or unlawful damage—no penal action can be brought against the heir." (*Institutes of Justinian*, Book IV, Title 12.) The principle adopted in the common law should also be borne in mind. *Actio personalis moritur cum persona.*

NOTES

SPECIAL COMMITTEE OF LAWYERS ON QUESTIONS RELATING TO THE INTERPRETATION OF THE COVENANT OF THE LEAGUE OF NATIONS

After the close of the discussion on the Italian occupation of Corfu at the Assembly of the League of Nations in 1923, a resolution was adopted by the Council on September 28, 1923, for the reference to a special committee of lawyers of five questions which had been framed with a view to setting at rest certain differences which had manifested themselves in the course of the discussions as to the proper construction of the Covenant of the League and as to the responsibility of a State for outrages committed on its territory.

The special committee consisted of ten members nominated by the States represented on the Council. Their names were as follows :

M. Adatci (chairman)	Japan
Lord Buckmaster	Great Britain
M. Buero	Uruguay
M. de Castello Branco Clark	Brazil
M. Fromageot	France
M. van Hamel	Legal Section of the Secretariat of the League
M. Rolandi Ricci	Italy
M. Unden	Sweden
The Marquis de Villa Urrutia	Spain
M. Ch. de Visscher	Belgium

The committee met at Geneva in January, 1924, and drew up the answers to the five questions. These were submitted to and unanimously accepted by the Council of the League at its meeting on March 13, 1924.

The English text of the questions and answers is as follows :

First Question : Is the Council, when seized at the instance of a Member of the League of Nations of a dispute submitted, in accordance with Article 15 of the Covenant, by such a Member as " likely to lead to a rupture," bound, either at the request of the other party or on its own authority, and before enquiring into any point, to decide whether in fact such description is well founded ?

Reply : The Council, when seized at the instance of a Member of the League of Nations of a dispute submitted, in accordance with the terms of Article 15 of the Covenant, by such a Member as " likely to lead to a rupture," is not bound, either at the request of the other party or on its own authority, and before enquiring into any point, to decide whether in fact such description is well founded.

The Council may at all times estimate the gravity of the dispute and determine the course of its action accordingly.

Second Question : Is the Council, when seized of a dispute in accordance with Article 15, paragraph 1, of the Covenant, at the instance of a Member of the League of Nations, bound, either at the request of a party or on its own authority, to suspend its enquiry into the dispute when, with the consent of the parties, the settlement of the dispute is being sought through some other channel ?

Reply : Where, contrary to the terms of Article 15, paragraph 1, a dispute is submitted to the Council on the application of one of the parties, where such a dispute already forms the subject of arbitration or of judicial proceedings, the Council must refuse to consider the application.

If the matter in dispute, by an agreement between the parties, has already been submitted to other jurisdiction, before which it is being regularly proceeded with, or is being dealt with in the said manner in another channel, it is in conformity with the general principles of law that it should be possible for a reference back to such jurisdiction to be asked for and ordered.

Third Question : Is an objection founded on Article 15, paragraph 8, of the Covenant the only objection, based on the merits of the dispute, on which the competence of the Council to make an enquiry can be challenged ?

Reply : Where a dispute likely to lead to a rupture is submitted to the Council on the application of one of the parties, in accordance with the provisions of Article 15, paragraph 1, the case contemplated in paragraph 8 of Article 15 is the only case in which the Council is not to enquire into the dispute.

In particular, the reservations commonly inserted in most arbitration treaties cannot be pleaded as a bar to the proceedings.

The commission considers it desirable to observe that, where the case arises, the Council should, in determining the course of its action, have regard to international engagements, such as treaties of arbitration or regional understandings, for securing the maintenance of peace.

Fourth Question : Are measures of coercion, which are not meant to constitute acts of war, consistent with the terms of Articles 12 to 15 of the Covenant when they are taken by one Member of the League of Nations against another Member of the League without prior recourse to the procedure laid down in those articles ?

Reply : Coercive measures which are not intended to constitute acts of war may, or may not, be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.

Fifth Question : In what circumstances and to what extent is the responsibility of a State involved by the commission of a political crime [*qy.* against foreigners] in its territory ?

Reply : The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of

the crime and the pursuit, arrest, and bringing to justice of the criminal.

The recognised public character of a foreigner, and the circumstances in which he is present in its territory, entail upon the State a corresponding duty of special vigilance on his behalf.

The text quoted above is the official text, but the wording of the first part of the answer to the second question appears to be a mistake. It reads "Where *contrary* to the terms of Article 15 . . .", and the word "contrairement" figures also in the French text, but the wording of the question is, ". . . when seized of a dispute *in accordance with* Article 15 . . .", in the French text "conformément à." At some time in the course of the proceedings the word "conformément" may have been miscopied as "contrairement," and the error remained unnoticed until the text had been formally adopted and it was too late to alter it.

The English version of the fifth question omits the words "against foreigners" which figure in the French text—"commis sur des étrangers." This omission, however, is unimportant as the words figure in the English text of the answer.

C.

APPLICATION OF THE *EJUSDEM GENERIS* RULE IN INTERNATIONAL LAW[1]

Most writers upon international law, from Grotius onwards, have recognized the desirability of introducing or establishing a code of rules for the guidance of those whose duty it is to interpret international engagements. The methods employed have been twofold: first and mainly, the incorporation of certain rules of interpretation which are found current in Roman law or in the system of law with which the writer is most familiar; and, secondly, the deduction of certain rules from actually recorded practice. The result of these methods is the lengthy list of rules which are to be found in most general text-books of international law.[2] I do not think it is disrespectful to the great writers to say that many of these rules are tinged with a love of dialectic which is somewhat exasperating to-day, and are more impressive than useful to those who are seeking to construe a document like the Treaty of Versailles. On the other hand, unaided common sense, while admirably suited to the task of evolving a construction which is satisfactory to one party, is not always the best instrument for achieving a construction which will win general acceptance. The practice of importing into the construction of treaties rules applied by various systems of municipal law in the construction of contracts is of questionable soundness unless the rule being imported can be said to be so fundamental and universal as to be *communis juris*,[3] as many rules of the civil law may well be. In the civil law the *ejusdem generis* rule is not recognized as such, though occasionally the interpretations of expressions occurring in wills come very

[1] With special reference to the Treaty of Versailles. See p. 27.

[2] For two good instances, see Vattel: *Le Droit des gens*, II, Ch. XVII, and Phillimore: *International Law*, Vol. II, Ch. VIII.

[3] See Oppenheim: *International Law*, Vol. I, § 554 (14).

near to it.[1] I have found instances in South African cases but cannot say from what source the rule has been introduced. Nor does the rule appear to be recognized in France (though Article 1163 of the *Code Civil* may sometimes produce the same effect), nor in Germany. Doubtless in every country cases occur where general words in a document receive from the judges a restricted meaning in view of the whole tenor of the instrument, but that is not the *ejusdem generis* rule strictly so called. In construing a document like the Treaty of Versailles, the parties to which number twenty-seven and range the world literally " from China to Peru," we must be very certain of the universality of any rules of construction before we seek to add them to the *corpus* of international law. Curiously enough, an instance of its application, though not *eo nomine*, occurs in the Administrative Decision No. II of the Mixed Claims Commission (United States and Germany) delivered on November 1, 1923, by the Umpire, Honourable Edwin B. Parker, with the concurrence of the American and German Commissioners and laying down " some of the basic principles which will, so far as applicable, control the preparation, presentation, and decision of all cases submitted to the Commission." [2] This Commission is charged with the duty of assessing claims against Germany by American nationals who have

> " suffered through the acts of the Imperial German Government, or its agents . . . loss, damage or injury to their persons or property, directly or indirectly, whether through the ownership of shares of (*sic*) stock in German, Austro-Hungarian, American or other corporations, or in consequence of hostilities or of any operations of war, or otherwise."

Commenting upon these words, the Umpire says [3]:

> " Going one step further, if there be applied to the word ' otherwise ' found in section 5 of the resolution as a part of the phrase ' or in consequence of hostilities or of any operations of war, or otherwise ' the same rules of construction as American counsel applies to the balance of that phrase, then it would follow that Germany is liable for all losses of every nature, no matter if the cause was entirely foreign to the war, wheresoever and howsoever suffered by American nationals since July 31, 1914. The mere statement of the extreme lengths to which the interpretation we are asked to adopt carries us demonstrates its unsoundness."

The Umpire's ruling is not expressly based on the *ejusdem generis* rule but appears to be a recognition—perhaps unconscious—of its influence. However, he is construing an agreement made between only two parties, the United States and Germany, and, valuable as his Award is as a statement of the principles which are relevant for the guidance of an International Commission, I should hesitate to argue that the *ejusdem generis* rule is applicable in the construction of a document such as the Treaty of Versailles to which twenty-seven States are parties. In fact I incline to the view that the *ejusdem generis* rule is essentially the kind of rule to which Hall's remark [4] is relevant : " There is no place for the refinements of the courts in the rough jurisprudence of nations."

ARNOLD D. MCNAIR.

[1] Particularly so *Digest*, XXXIII. 6. 16. 2.
[2] *American Journal of International Law*, Vol. 18 (1924), p. 177.
[3] p. 184.
[4] *International Law*, 7th ed., p. 349 (n.).

THE AIR NAVIGATION CONVENTION, 1919

This convention, which was signed at Paris on October 13, 1919, and of which ratifications were deposited at Paris on June 1, 1922, on behalf of Belgium, Bolivia, the British Empire, France, Greece, Portugal, the Serb-Croat-Slovene State, Siam, and Japan, came into force as between the ratifying States forty days after deposit of ratification. It has since been ratified by Italy and Czecho-Slovakia, and Bulgaria and Persia have adhered to the convention.

The convention, while affirming the principle of the sovereignty of the air (Article 1), provides for freedom of innocent air passage over the territory of the contracting States for each party to the convention, provided the conditions laid down in it are observed. This freedom of passage does not apply to " prohibited areas " which States may desire for military reasons to close to all private aircraft, including their own. Under the convention the nationality of an aircraft follows the country of registration, and registration follows the nationality of the owner. Double registration is prohibited. Every aircraft engaged in international navigation must be in possession of a certificate of airworthiness issued or rendered valid by the State whose nationality it possesses, and the pilot or other member of the crew must be provided with certificates of competency and licences issued or validated by the same State. Contracting States have the right to reserve for their own national aircraft the carriage of persons or goods for hire between any two points in their territories. The documents (certificates, licences, log books, passenger lists, manifests) which aircraft must be provided with are laid down. Provision is made for the rendering of assistance to aircraft in landing or in distress, for the application to aircraft wrecked at sea of the principles of the maritime law of salvage, for the use of aerodromes at a common tariff of charges, and for certain other matters. The convention is not applicable to military aircraft nor to State non-military aircraft employed on customs and police service ; State aircraft employed on other services (e.g. postal) are, however, subject to the provisions of the convention. A military aircraft is defined as one commanded by a person in military service detailed for the purpose, and such an aircraft can fly over another contracting State's territory only in virtue of a special authorization.

The convention provides for the setting up of an International Commission for Air Navigation, of a permanent nature, composed of representatives of the United States, France, Italy, and Japan (two from each), Great Britain and each Dominion and India (one each), and of the other contracting States (one each). This Commission is charged with certain powers, including the amendment of the annexes to the convention, the receipt or initiation of proposals to amend the convention itself, the inter-communication of information affecting air navigation, &c.

The convention does not bind the contracting States in the event of a war either as belligerents or neutrals. It may be denounced by one year's notice. States which did not take part in the Great War may adhere to the convention ; special provisions are laid down regarding the adherence of States which took part in the war.

The annexes contain provisions in regard to the marking of aircraft, certificates of airworthiness, log books, rules as to lights and signals, rules of the air, certification of pilots and navigators, aeronautical maps and ground markings,

collection and dissemination of meteorological information, and customs procedure.

The chief obstacles to the general acceptance of the convention have been found to arise from Articles 5 and 34, and accordingly the following amendments of the convention have been agreed to but will not take effect until ratified by all the contracting States.

(*a*) Article 5 (which forbade contracting States to permit, except by a special and temporary authorization, the flight above their territory of aircraft not possessing the nationality of a contracting State) is to be amended by the addition of the following words :

> " unless it has concluded a special convention with the State in which the aircraft is registered. The stipulations of such special convention must not infringe the rights of the contracting parties to the present convention, and must conform to the rules laid down by the said convention and its annexes. Such special convention shall be communicated to the International Commission for Air Navigation which will bring it to the knowledge of the other contracting States."

The Protocol of Amendment was drawn up by the International Commission for Air Navigation at the second session held in London on October 25, 1922, and has been signed by all the contracting States except Bolivia and Persia, and has been ratified by the Belgian Government and the whole of the British Empire.

(*b*) Article 34 (which regulates the voting power of the States and gives the British Empire, France, Italy, and Japan a " weighted " vote) is to be amended on the basis of " one State one vote," with the proviso that, for any modification of the provisions of any of the annexes, the majority voting in favour of the amendments must include at least three of the five following States :—the United States of America, the British Empire, France, Italy, and Japan.

The Protocol of Amendment was drawn up at the fourth Session of the International Commission for Air Navigation held in London on June 30, 1923, and has been signed by all the contracting States except Canada, Bolivia, the Serb-Croat-Slovene State, and Persia. The position with regard to the Irish Free State is not yet fully determined.

The International Commission for Air Navigation has approved fairly extensive amendments of the technical annexes of the Convention. Such amendments are within the powers of the Commission and do not require to be ratified by the contracting States.

J. M. Spaight.

APPLICABILITY OF THE UNITED STATES PROHIBITION LAW TO FOREIGN SHIPS ENTERING AMERICAN PORTS

The United States Supreme Court considered this question in the case of the *Cunard Steamship Company* v. *Mellon*.[1]

Section 1 of the Eighteenth Amendment of the United States Constitution provides as follows :

[1] 43 Sup. Ct. Reporter 504.

> " After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

The National Prohibition Act (the Volstead Act) was passed by the United States Congress to provide means of enforcing this amendment.

The Cunard and other steamship companies had been in the habit of bringing intoxicating liquors as part of their sea stores, and selling them to passengers, or, in some cases, as required by the law of the flag of the ship, providing them for the crew. United States customs regulations were issued authorizing the seizure of such liquors brought within the ports of the United States in contravention of this law. Other proceedings had been taken by the owners of ships of American registry arising out of the threat to prosecute them for sales of such liquors made on the ship while on the high seas.

The United States Supreme Court dealt with appeals in both such cases. The chief contention arose as to the meaning of the words " transportation," " importation " and " territory." The Supreme Court held that these words were to be taken in their ordinary sense, that :

> " ' transportation ' comprehends any real carrying about or from one place to another. It is not essential that the carrying be for hire or by one for another, nor that it be incidental to a transfer of the possession or title "

and that :

> " ' importation ' consists in bringing an article into a country from the outside. If there be an actual bringing in it is importation regardless of the mode in which it is effected. Entry through a Custom House is not of the essence of the Act."

" Territory " means—

> " the regional areas—of land and adjacent waters—over which the United States claims and exercises dominion and control as a sovereign power."

The Court said :

> " It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbours, bays, and other enclosed arms of the sea along its coast, and a marginal belt of the sea extending from the coastline outward a marine league or three geographic miles.
> . . . Westlake's *International Law*, 2nd ed. 187 ; Wheaton's *International Law*, 5th English ed. (Phillipson), 282 ; 1 Oppenheim, *International Law*, 3rd ed., ss. 185–9, 252; 1 Moore, *International Law Digest*, 145 ; *Louisiana* v. *Mississippi*, 202 U.S. 1.
> This we hold is the territory which the amendment designates as its field of operation ; and the designation is not of a part of this territory, but ' all ' of it."

The Court also held that territory under this Act meant " the physical territory of the United States " and not the high seas, that the statement sometimes made that a merchant ship is part of the territory of the country whose flag she flies is a figure of speech (citing Moore, Westlake, and Hall), and further said:

> " It is chiefly applicable to ships on the high seas where there is no territorial sovereign; and as respects ships in foreign territorial waters it has little application beyond what is affirmatively or tacitly permitted by the local sovereign (citing Oppenheim, ss. 128, 146, 260). . . .
>
> The defendants further contend that the amendment covers foreign merchant ships, when within the territorial waters of the United States. Of course, if it were true that a ship is a part of the territory of the country whose flag she carries the contention would fail. But as that is a fiction, we think the contention is right.
>
> The merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place, and correlatively is bound to yield obedience to them. Of course the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction, or to exert the same in only a limited way, but this is a matter resting absolutely in its discretion. . . .
>
> In principle, therefore, it is settled that the amendment could be made to cover both domestic and foreign merchant ships when within the territorial waters of the United States. And we think it has been made to cover both when within those limits."

Considering the provisions of the National Prohibition Act (which exempts liquor in transit through the Panama Canal or on the Panama Railroad), the Court said:

> " Examining the Act as a whole, we think it shows very plainly, first, that it is intended to be operative throughout the territorial limits of the United States, with the single exception stated in the Canal Zone provision; secondly that it is not intended to apply to domestic vessels when outside the territorial waters of the United States; and thirdly that it is intended to apply to all merchant vessels whether foreign or domestic when within those waters save as the Panama Canal Zone exception provides otherwise."

This was not meant to imply that Congress had no power to regulate the conduct of domestic ships when on the high seas or in foreign waters (when and as permitted by the territorial sovereign); it had such power, but the amendment and the Act were confined in their operation to the " territorial limits of the United States."

Mr. Justice Sutherland rendered the only dissenting judgment. He agreed with the decision so far as it affected domestic ships but not as to foreign ships in American ports under the circumstances. He held that under the facts disclosed they constituted matters relating to " the internal affairs of the ship," which by general rules of international law " are not subject to interference at

the hands of another State in whose ports it is temporarily present," and that in his view foreign vessels were not intended to be included in the terms of the Eighteenth Amendment or National Prohibition Act (Volstead Act).

These citations adequately summarize the decision of the Court without further comment.

J. Arthur Barratt.

THE LIQUOR TREATY BETWEEN THE BRITISH EMPIRE AND THE UNITED STATES OF AMERICA

The recent treaty which enables the United States to seize British vessels outside the three-mile limit for suspected violations of the American prohibition law constitutes the solution which the two Governments have found for the difficulties to which the enforcement of the Volstead Act has given rise.

Some insight into the conversations between the State Department and the Foreign Office is afforded by the speech of Lord Curzon in the House of Lords on June 28, 1923.[1] The United States were anxious that steps should be taken by His Majesty's Government to check the traffic in contraband liquor carried on from British territory (mainly the West Indies) and under the British flag by vessels which hung about outside territorial waters. The British Government on their side were not disposed to acquiesce in the seizure of British vessels on the high seas. In June, 1922, the United States Government proposed the conclusion of a treaty for the purpose of checking liquor smuggling and for putting an end to certain evasions of the law by which this smuggling was being facilitated, such as taking out double clearance papers and the grant of British registration to American vessels on fraudulent pretences.

Among the provisions which this proposed treaty was to contain were reciprocal stipulations authorizing the officials of each country to exercise a right of search over vessels of the other up to a limit of twelve miles from the shore.

His Majesty's Government declined to enter into any arrangement of this kind on the ground that they were opposed to any extension of the limits of territorial waters and that the smuggling which had led to the proposal could only be regarded as a temporary matter.

Further difficulties arose out of the continued seizures of British vessels lying outside the three-mile limit off the American shore, and after the decision of the Supreme Court of the United States in the case of *Cunard Steamship Company* v. *Mellon*, summarized in a preceding note, it became impossible for British vessels entering American ports and waters to carry, even under seal, liquor for use on board after the vessel had left American jurisdiction. The United States then reverted to their proposal for a treaty. Lord Curzon described the proposal as one for extending the three-mile limit to a twelve-mile limit; the arrangement was to be a temporary and *ad hoc* one and was not to constitute an enlargement of territorial limits as hitherto accepted. It was merely to confer a right of search and seizure on the officers of one country against the vessels of the other in cases where there was reason to believe that the vessel was engaged in the wilful commission of an act which constituted

[1] *Parliamentary Debates* (House of Lords), Fifth Series, 1923, Vol. 54, p. 723.

a violation of the laws of the State of which the boarding officer was an official. In return, articles of which the importation was prohibited by the laws of either party were to be allowed to be brought under seal within the territorial waters of that party. Some further information as to the form of the proposal then made by the United States Government may be gleaned from the columns of the *Washington Evening Star* of June 13, 1923.

The matter has since been regulated by a convention under which His Majesty's Government allows the search and seizure of British vessels outside territorial waters where the vessel is believed to be concerned in an offence against the law of the United States prohibiting the importation of alcoholic beverages, but this right is only to be exercised within a distance from the shore which the vessel by which the importation was to be effected can traverse in one hour. In return British merchant vessels are allowed to carry alcoholic liquor under seal within American waters either as sea stores or as cargo destined for a foreign port. By the first article both Powers declare that they intend to uphold the three-mile limit as the width of the marginal belt of territorial waters.

The noteworthy features of the convention are the adoption of a variable limit within which vessels may be boarded and seizures effected instead of a fixed zone, and the institution of machinery for the settlement of all claims which may arise as to use or abuse of the powers it confers.

The full text [1] which was signed at Washington on January 23, 1924, and of which the ratifications were exchanged on May 22, is as follows :

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India ;

And the President of the United States of America ;

Being desirous of avoiding any difficulties which might arise between them in connexion with the laws in force in the United States on the subject of alcoholic beverages ;

Have decided to conclude a convention for that purpose ;

And have appointed as their Plenipotentiaries :

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India :

The Right Honourable Sir Auckland Campbell Geddes, G.C.M.G., K.C.B., his Ambassador Extraordinary and Plenipotentiary to the United States of America ;

The President of the United States of America :

Charles Evans Hughes, Secretary of State of the United States ;

Who, having communicated their full powers found in good and due form, have agreed as follows :

ARTICLE 1.

The High Contracting Parties declare that it is their firm intention to uphold the principle that three marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limits of territorial waters.

[1] [Cmd. 2063], *United States No.* 1 (1924), price 2*d*.

ARTICLE 2.

1. His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that inquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavouring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such inquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

2. If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offence against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

3. The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions than can be traversed in one hour by the vessel suspected of endeavouring to commit the offence. In cases, however, in which the liquor is intended to be conveyed to the United States, its territories or possessions, by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised.

ARTICLE 3.

No penalty or forfeiture under the laws of the United States shall be applicable or attach to alcoholic liquors or to vessels or persons by reason of the carriage of such liquors, when such liquors are listed as sea stores or cargo destined for a port foreign to the United States, its territories or possessions, on board British vessels voyaging to or from ports of the United States, or its territories or possessions, or passing through the territorial waters thereof, and such carriage shall be as now provided by law with respect to the transit of such liquors through the Panama Canal, provided that such liquors shall be kept under seal continuously while the vessel on which they are carried remains within said territorial waters and that no part of such liquors shall at any time or place be unladen within the United States, its territories or possessions.

ARTICLE 4.

Any claim by a British vessel for compensation on the grounds that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by Article 2 of this treaty or on the ground that it has not been given the benefit of Article 3 shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the High Contracting Parties.

Effect shall be given to the recommendations contained in any such joint report. If no joint report can be agreed upon, the claim shall be referred to the Claims Commission established under the provisions of the Agreement for the Settlement of Outstanding Pecuniary Claims signed at Washington the

18th August, 1910, but the claim shall not, before submission to the tribunal, require to be included in a schedule of claims confirmed in the manner therein provided.

ARTICLE 5.

This treaty shall be subject to ratification and shall remain in force for a period of one year from the date of the exchange of ratifications.

Three months before the expiration of the said period of one year, either of the High Contracting Parties may give notice of its desire to propose modifications in the terms of the treaty.

If such modifications have not been agreed upon before the expiration of the term of one year mentioned above, the treaty shall lapse.

If no notice is given on either side of the desire to propose modifications, the treaty shall remain in force for another year, and so on automatically, but subject always in respect of each such period of a year to the right on either side to propose as provided above three months before its expiration modifications in the treaty, and to the provision that if such modifications are not agreed upon before the close of the period of one year, the treaty shall lapse.

ARTICLE 6.

In the event that either of the High Contracting Parties shall be prevented either by judicial decision or legislative action from giving full effect to the provisions of the present treaty the said treaty shall automatically lapse, and, on such lapse or whenever this treaty shall cease to be in force, each High Contracting Party shall enjoy all the rights which it would have possessed had this treaty not been concluded.

The present convention shall be duly ratified by His Britannic Majesty, and by the President of the United States of America, by and with the advice and consent of the Senate thereof; and the ratifications shall be exchanged at Washington as soon as possible.

In witness whereof the respective Plenipotentiaries have signed the present convention in duplicate, and have thereunto affixed their seals.

Done at the city of Washington, this twenty-third day of January, in the year of our Lord one thousand nine hundred and twenty-four.

(Seal) A. C. GEDDES.
(Seal) CHARLES EVANS HUGHES.

Similar treaties have now been concluded between the United States and Germany and the United States and Sweden.

C.

SUBMISSION OF TREATIES TO PARLIAMENT

A NEW practice with regard to the submission of treaties to Parliament was explained to the House of Commons by Mr. Ponsonby, the Parliamentary Under-Secretary of State for Foreign Affairs in London, when introducing the Bill for giving effect to the Treaty of Peace with Turkey on April 1, 1924.

In future all treaties will after signature and before the King is advised to ratify them be laid on the table of the House for a period of twenty-one days.

By this means due publicity will be given to the terms of the treaties and all risk eliminated of the nation being subjected to obligations of which its members have no knowledge.

Mr. Ponsonby's words, as reported in Hansard,[1] were as follows :

> " It is the intention of His Majesty's Government to lay on the Table of both Houses of Parliament every Treaty, when signed, for a period of twenty-one days, after which the Treaty will be ratified and published and circulated in the Treaty Series. In the case of important Treaties, the Government will, of course, take an opportunity of submitting them to the House for discussion within this period. But, as the Government cannot take upon itself to decide what may be considered important or unimportant, if there is a formal demand for discussion forwarded through the usual channels from the Opposition or any other party, time will be found for the discussion of the Treaty in question."

It is noteworthy that no change is foreshadowed by the above words in the constitutional procedure as to the negotiation or ratification of the treaties. No machinery is introduced which renders a formal expression of Parliamentary concurrence necessary ; neither a resolution approving the treaty, still less an Act of Parliament, will be required. It is the absence of disapproval which will be taken as the sanction of the legislators assembled in Parliament. It is publicity and opportunity for discussion and criticism which the new system is intended to ensure.

Technically publicity is not the same as Parliamentary control. From the point of view of the constitutional expert they are radically different, but publicity, coupled with an assurance of opportunity of Parliamentary discussion if called for, achieves the same purpose as Parliamentary control and achieves it in a much more elastic form, as no Parliamentary action will be called for in the case of a treaty which provokes no serious criticism.

Mr. Ponsonby's announcement was not very specific as to the type of agreements covered by the use of the word " treaty ". In a later passage in his speech he said :

> " There are, of course, international conventions of a purely technical character which are not subject to ratification, and there is no reason to alter the procedure with regard to them. But treaties such as those with which I am dealing do not cover the whole ground, and His Majesty's Government desire that Parliament should also exercise supervision over agreements, commitments and understandings by which the nation may be bound in certain circumstances and which may involve international obligations of a serious character, although no signed and sealed document may exist."

The intention would appear to be to keep Parliament very fully apprised of all Government commitments to foreign Powers except those of a purely technical character which excite no public interest, but to make no change of a constitutional character which would render formal approval by Parliament a necessary condition of ratification.

C.

[1] *Parliamentary Debates* (House of Commons), 1924, Vol. 171, p. 2007.

DISAPPEARANCE OF THE CAPITULATIONS IN TURKEY

One result of the Lausanne settlement will be the disappearance of the capitulations which have existed for so long in Turkey. It will be remembered that in September, 1914, the Ottoman Government purported to abolish the capitulations by a unilateral act, which promptly evoked a protest from all the Powers concerned. The abolition of the system also figured prominently in the Turkish National Pact.

During the Lausanne Conference there was considerable discussion as to the effect of the Turkish action of September, 1914, and the subsequent outbreak of war between Turkey and the Allied Powers on the latter's capitulatory rights, and the matter was finally settled by Article 28 of the Treaty of Peace,[1] under which each of the contracting parties "hereby accepts in so far as it is concerned the complete abolition of the capitulations in Turkey in every respect."

The treaty signed at Lausanne between the United States and Turkey also provides for the surrender by the former Power of its capitulatory rights, and the position of those capitulatory Powers which took no part in the war is presumably being settled on the same lines.

The result will be in judicial matters that, generally speaking, foreigners in Turkey will be subject to the jurisdiction of the local courts in the same way as in any other country. So far as the Allied Powers are concerned, the questions of jurisdiction resulting from the abolition of the capitulations are dealt with in Chapter 2 of the Convention respecting Conditions of Residence and Business and Jurisdiction.[2] Allied nationals will have free access to the Turkish courts, and may sue and be sued on the same conditions in all respects as Turkish nationals. Questions of jurisdiction will, as between Turkey and the Allied Powers, be decided in accordance with the principles of international law, subject to one important exception. This exception arises from the provisions of Article 16, under which, as regards non-Moslem nationals of the Allied Powers, all matters of personal status are reserved to the national tribunals or other competent national authorities established in the country of which the party concerned is a national. The Turkish courts are only competent in such matters if all the parties to the case submit in writing to their jurisdiction, and in such cases the national law of the parties is to be applied by the Turkish courts. All questions relating to such matters as security for costs, execution of judgments, service of documents, &c., are left to be regulated by bi-lateral conventions between Turkey and the Allied Powers. The convention remains in force for a period of seven years, and thereafter until a year after denunciation.

Under the Declaration relating to the Administration of Justice,[3] which was made by the Turkish plenipotentiaries at the time of the signature of the Peace Treaty and is included in the Final Act of the Conference, the Turkish Government will take into its service for a period of not less than five years a number of European legal counsellors, selected by the Turkish Government from a list prepared by the Permanent Court of International Justice from among jurists nationals of countries which were neutral during the war. These

[1] *Foreign Office Treaty Series* No. 16, 1923 [Cmd. 1929], price 8*s*.
[2] *Ibid.*, p. 139, at p. 149.
[3] *Ibid.*, p. 201.

counsellors will serve under the Ministry of Justice, and some of them will be posted at Constantinople and some at Smyrna ; they will take part in the work of any legislative commissions ; and it will be their duty to observe the working of the Turkish courts, to forward to the Ministry of Justice such reports as they may consider necessary, to receive complaints relating to the administration of justice, the execution of sentences or the manner of application of the law, with a view to bringing such complaints to the notice of the Minister of Justice. They will also be entitled to receive complaints relating to domiciliary visits or arrests, and in the judicial districts of Constantinople and Smyrna they are to be immediately informed of the taking of any such measures. On June 4, 1923, Ismet Pasha made a formal statement in the First Committee, according to which the number of counsellors to be taken into the service of the Turkish Government will be not less than four, and the conditions of service and salary will be fixed by agreement between the Turkish Government and the Permanent Court. It is understood that the Turkish Government has applied to the Court to prepare a list of candidates drawn from nationals of countries which were neutral in the war of 1914–18, and that the Court directed the President to invite the legal authorities in Denmark, Spain, Norway, the Netherlands, Sweden, and Switzerland respectively to submit to it the names of two nationals.

The Judicial Declaration also contains provisions under which in cases of minor offences release on bail is always to be ordered, unless this course might entail danger to public safety or impede the investigation of the case, and in civil or commercial matters all references to arbitration and clauses in agreements providing therefor are allowed, and arbitral decisions rendered in pursuance thereof will be executed by the Turkish courts.

The Judicial Declaration is to remain in force for a period of five years.

W.

NEGOTIATION AND CONCLUSION OF TREATIES AFFECTING ANY PART OF THE BRITISH EMPIRE

Among the subjects on which agreement was reached at the meeting of the Imperial Conference in October, 1923, was that of the method and extent of the inter-Imperial consultation in connexion with the negotiation, signature, and ratification of treaties.

The following is the text of the Resolution [1] drawn up and agreed to by a committee of the Conference, presided over by the Secretary of State for Foreign Affairs.

" The Conference recommends for the acceptance of the governments of the Empire represented that the following procedure should be observed in the negotiation, signature and ratification of international agreements.

The word " treaty " is used in the sense of an agreement which, in accordance with the normal practice of diplomacy, would take the form of a treaty between Heads of States signed by plenipotentiaries provided with Full Powers issued by the Heads of the States and authorizing the holders to conclude a treaty.

[1] *Imperial Conference, 1923: Summary of Proceedings*, p. 13. [Cmd. 1987], price 6*d*.

I.

1. *Negotiation.*

(*a*) It is desirable that no treaty should be negotiated by any of the governments of the Empire without due consideration of its possible effect on other parts of the Empire or, if circumstances so demand, on the Empire as a whole.

(*b*) Before negotiations are opened with the intention of concluding a treaty, steps should be taken to ensure that any of the other governments of the Empire likely to be interested are informed, so that, if any such government considers that its interests would be affected, it may have an opportunity of expressing its views or, when its interests are intimately involved, of participating in the negotiations.

(*c*) In all cases where more than one of the governments of the Empire participates in the negotiations, there should be the fullest possible exchange of views between those governments before and during the negotiations. In the case of treaties negotiated at International Conferences, where there is a British Empire Delegation, on which, in accordance with the now established practice, the Dominions and India are separately represented, such representation should also be utilized to attain this object.

(*d*) Steps should be taken to ensure that those governments of the Empire whose representatives are not participating in the negotiations should, during their progress, be kept informed in regard to any points arising in which they may be interested.

2. *Signature.*

(*a*) Bi-lateral treaties imposing obligations on one part of the Empire only should be signed by a representative of the government of that part. The Full Power issued to such representative should indicate the part of the Empire in respect of which the obligations are to be undertaken, and the preamble and text of the treaty should be so worded as to make its scope clear.

(*b*) Where a bi-lateral treaty imposes obligations on more than one part of the Empire, the treaty should be signed by one or more plenipotentiaries on behalf of all the governments concerned.

(*c*) As regards treaties negotiated at International Conferences, the existing practice of signature by plenipotentiaries on behalf of all the governments of the Empire represented at the Conference should be continued, and the Full Powers should be in the form employed at Paris and Washington.

3. *Ratification.*

The existing practice in connection with the ratification of treaties should be maintained.

II.

Apart from treaties made between Heads of States, it is not unusual for agreements to be made between governments. Such agreements, which are usually of a technical or administrative character, are made in the names of the signatory governments, and signed by representatives of those governments, who do not act under Full Powers issued by the Heads of the States : they are not ratified by the Heads of the States, though in some cases some form of acceptance or confirmation by the governments concerned is employed. As regards agreements of this nature the existing practice should be continued,

but before entering on negotiations the governments of the Empire should consider whether the interests of any other part of the Empire may be affected, and, if so, steps should be taken to ensure that the government of such part is informed of the proposed negotiations, in order that it may have an opportunity of expressing its views."

The Resolution was submitted to the full Conference and unanimously approved. It was thought, however, that it would be of assistance to add a short explanatory statement in connexion with part I (3), setting out the existing procedure in relation to the ratification of Treaties. This procedure is as follows :

(*a*) The ratification of treaties imposing obligations on one part of the Empire is effected at the instance of the Government of that part :

(*b*) The ratification of treaties imposing obligations on more than one part of the Empire is effected after consultation between the Governments of those parts of the Empire concerned. It is for each Government to decide whether Parliamentary approval or legislation is required before desire for, or concurrence in, ratification is intimated by that Government.

C.

GENERAL CONVENTIONS

I. General Conventions signed in 1923–4.

The general conventions signed during 1923–4 deal with social, economic and transit questions.

Obscene Literature Convention.[1]

By a resolution adopted on September 28, 1922, the Assembly of the League of Nations invited the French Government to summon a conference to consider the question of the suppression of the circulation of and traffic in obscene literature. This conference met at Geneva under the auspices of the League of Nations from August 31 to September 12, 1923. Thirty-three States, Members of the League of Nations, sent delegates. A delegate of Monaco also took part in the conference, and the United States were represented in an advisory capacity. The conference worked on the basis of the draft convention which had been drawn up in Paris in 1910, but decided that a new convention, extending the scope of the provisions of the agreement of 1910, was required. It drew up this new convention and also a final act of the conference, in which certain important supplementary agreements were embodied. The final act was signed by the representatives of all the countries which took part; the convention was signed immediately by the delegates of twenty-two countries, and the number of signatories has now (April 1924) reached forty-two.

The purpose of the convention is set out in Article 1, by which the contracting States agree " to take all measures to discover, prosecute and punish any person engaged in committing " various offences, such as trading in, exhibiting, importing, exporting, advertising, or in other ways promoting the circulation of

[1] The text of the convention is to be found in the *League of Nations Official Journal*, October, 1923, p. 1151. (Constable, 5*s*.)

or traffic in obscene objects. By Article 2 persons guilty of such offences may be tried either in the courts of the country of which they are nationals, or in the courts of the country where any constitutive element of the offence has been committed. Article 3 deals with obtaining evidence relating to such offences by means of rogatory commissions. Other articles provide for the prompt interchange between the competent authorities of the different contracting States, of full information concerning any seizure of obscene objects or prosecution for offences under the convention, on their territory; for the ratification of, or accession to, the agreement of May 4, 1910, by every State which is a party to the new convention, and for the coming into force of the agreement of 1910 on the same date as the convention itself in the whole of the territory of the ratifying or adhering country; and for the settlement of disputes relating to the interpretation or application of the convention by reference to the Permanent Court of International Justice, if both parties to the dispute are signatories to the Statute of the Permanent Court of International Justice, or if they are not, either to the Permanent Court of International Justice or to arbitration.

A conference for the revision of the convention is to be summoned by the Council of the League of Nations whenever a request for revision is made by five of the signatory or adherent parties. In any case the Council is to consider the desirability of a new conference at the end of each period of five years.

The final act of the conference embodies a recommendation that the Secretariat of the League of Nations should be charged with issuing periodically to all the competent authorities charged with the suppression of the traffic in the various signatory countries a questionnaire about the traffic and about the application of the convention. It also embodies a request to the Council of the League of Nations to communicate the convention for signature to all Governments, whether Members of the League of Nations or not, to which the Council may think it desirable to send it.

Protocol on Arbitration Clauses.[1]

The Protocol on Arbitration Clauses was prepared in the first instance by the Economic Committee of the League of Nations and on their suggestion submitted by the Council to the Governments as a draft for their consideration. In the light of the comments made by various Governments the protocol was redrafted and submitted to the Second (Technical) Committee of the Assembly, which approved a final text and submitted it to the full Assembly in September, 1923, with the recommendation that the protocol should be opened immediately for signature. The Assembly adopted this recommendation in a resolution agreed to on September 24, 1923.

The purpose of the protocol is stated in the first paragraph of this resolution:

> "The Assembly, realising the desirability and urgency of assuring by an international agreement a more general recognition of the validity of the arbitration agreement, whether referring to present or future differences, which is designed to regulate by means of arbitration differences that

[1] The text of the protocol is to be found in the *League of Nations Official Journal*, January, 1924, Part II. (Constable, 8*s*.)

> may arise in connection with contracts and especially, with commercial contracts, concluded between persons subject to the jurisdiction of different States . . ."

To this end the Powers signatory to the protocol undertake to recognize the validity of agreements contained in commercial or other contracts which provide for the settlement of disputes by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject. The arbitral procedure is to be governed by the will of the parties and by the law of the country where the arbitration takes place. The contracting States undertake to facilitate such arbitral procedure in every way, and to ensure the execution by their national authorities of arbitral awards. They also undertake that their tribunals shall in the case of a dispute arising concerning such an arbitration agreement refer the parties on the application of either of them to the decision of the arbitrators; and that the competence of their tribunals shall be suspended until the agreement or the arbitration cannot proceed or becomes inoperative.

The protocol, to the rapid signature and ratification of which commercial circles in all countries engaged in international trade attach much importance, has been signed up to the present time by ten States.

Convention relating to the Simplification of Customs Formalities.[1]

This convention was prepared by an international conference which sat in Geneva from October 15 to November 3, 1923. Thirty-two States Members of the League, together with representatives of Germany, Egypt, Tunis and the French Protectorate of Morocco, took part in the conference. The United States sent an observer and four experts, and the International Chamber of Commeree sent a delegation in an advisory capacity.

The convention is designed as a first step towards carrying out the principle of Article 23 (*e*) of the Covenant of the League of Nations, namely "equitable treatment for the commerce of all the Members of the League." It lays down a considerable body of precise obligations and a number of broad principles concerning the conduct of States in relation to the great international interests involved in international trade. It does not relate to or affect the tariff poliey of the signatory Powers, but merely concerns the machinery of their customs system.

The fundamental obligation of the convention is that by which the States "undertake that their commercial relations shall not be hindered by excessive, unnecessary or arbitrary Customs or other similar formalities." To this end they undertake so to modify their customs law as to adapt it from time to time "to thc needs of foreign trade," and to the avoidance of all hindrance to such trade except that which is absolutely necessary to safeguard the essential interests of the State.

In addition to removing every obstacle to the free flow of trade which is not necessary to safeguard the interests of the State, the contracting States undertake to observe strictly the principle of equitable treatment of the trade of other contracting States, and to abstain from any unjust discrimination against their commerce.

[1] The text is to be found in the *League of Nations Official Journal*, December, 1923, p. 1573. (Constable, 4*s*.)

The contracting States further undertake to limit import and export prohibitions and restrictions to a minimum and to simplify in every possible way the conditions in which special import or export licences are required; to publish their customs and other similar regulations and their tariffs; to provide full facilities for making these publications accessible to every one who wishes to have them, and to centralize their distribution through the Secretariat of the League of Nations and the International Office for the Publication of Customs Tariffs at Brussels.

The contracting States also agree to pass measures for preventing the arbitrary or unjust application in individual cases of their customs laws and for securing redress in case such abuses have occurred; they agree to elaborate technical provisions for facilitating international commerce, including provisions relating to the passage across frontiers of samples or specimens, catalogues, objects intended for exhibitions, &c., and the granting of special facilities, identity cards, &c., to commercial travellers; and they accept a comprehensive clause concerning "certificates of origin."

Article 14 of the convention provides for the joint consideration of concerted action for simplifying the rapid passage of goods through the customs, and obliges the contracting States to consider favourably a series of elaborate recommendations contained in a lengthy annex of eighteen clauses attached to this Article.

The convention is not to infringe in any way on the general or specific emergency measures which a contracting State may be obliged to take to safeguard its security or vital interests. Nor does it abrogate international obligations previously undertaken as regards customs regulations. If disputes arise between parties concerning the interpretation or application of the convention the parties agree to submit the dispute to such technical body as the Council of the League may appoint for the purpose, reserving the right either to resort to judicial or arbitral procedure if they so prefer, including reference to the Permanent Court of International Justice. Such reference to the Permanent Court is made obligatory on the demand of one party in certain cases where the convention imposes perfectly plain and definite obligations.

In addition to the convention a complementary protocol was signed in which further agreements were embodied, as well as a final act in which a number of important recommendations were made. In particular it was agreed in the protocol that the convention does not affect international obligations relating to the preservation of the health of human beings, animals, or plants (particularly the International Opium Convention), &c. The convention has been signed up to the present by twenty-four States.

Convention and Statute on the International Régime of Railways.[1]

This convention and statute, together with the three following conventions to be described, were prepared at the second General Conference on Communications and Transit, which met in Geneva at the summons of the Council of the League of Nations on November 15, 1923. Forty-one countries, including

[1] The text of this and of the three other conventions adopted by the second General Conference on Communications and Transit is to be found in the *League of Nations Official Journal*, January, 1924, Part II.

Germany and Turkey, took part in the conference, which was also attended by an official observer from the United States of America. In addition to the four conventions which it prepared and which many of its members immediately signed, the conference agreed to certain protocols and to a Final Act in which some important recommendations were put forward.

The four conventions in question, like the three conventions adopted at the first General Conference on Communications and Transit at Barcelona in 1921, are all founded on the general principle contained in Article 23 (*e*) of the Covenant of the League of Nations, by which the Members of the League undertake to "make provision to secure and maintain freedom of communications and of transit."

In his opening speech the President of the conference described its purpose as the detailed application of this fundamental principle in such a way as to bring about

> "the transformation of international transport policy; in other words, to develop and create general international principles of a permanent nature capable of being adapted to the needs of all countries."

Of the four conventions now in question, that on the international régime of railways is undoubtedly the most important. It was described by the President of the conference as "the Magna Carta" of the international régime of railways. It is divided into two parts—the convention proper, which consists of ten short articles mostly concerned with defining the aims in view and the procedure to be followed, the only important provision being one which permits revision at the expiration of each period of five years on the demand of five contracting States; and the statute, which contains the substance of the technical agreements arrived at. The object of the two instruments is well defined in the preamble to the convention. They are not intended to take the place of bilateral or partial treaties between neighbouring States concerning railway administration; but, "on the contrary, by a concise and systematic codification of recognized international obligations in respect of international railway traffic" to give the widest possible extension to "the principles already established between certain States or certain administrations . . ." and thus to facilitate in the greatest possible measure the conclusion in the future of new special conventions to suit the requirements and developments of international traffic.

The statute is divided into six parts, which relate respectively to: (1) the interchange of international traffic by rail; (2) reciprocity in the use of rolling stock: technical uniformity; (3) relations between the railway and its users; (4) tariffs; (5) financial arrangements between railway administrations in the interest of international traffic; (6) general regulations.

There is no space to give an account of the agreements concluded under these different headings. Their general nature is perhaps shown by Part I, which deals with the interchange of international traffic by rail, and which provides for the junction of international lines; for allowing through services on these lines; for the establishment and use wherever possible of a single common station for frontier services; for the provision of all necessary facilities and protection for international services; for the fair treatment of all nationals without political prejudice; for the regulation and simplification of all customs,

police and passport formalities ; for the encouragement of all technical measures calculated to ensure speedy and efficient service on the more important trade routes, and so on. Similarly, under Part II, the contracting States undertake to promote agreements dealing with the technical uniformity of railways, especially in respect of the construction and upkeep of rolling stock and the loading of trucks, &c.

The general regulations contained in Part VI permit of deviations from the provisions of the statute in case of emergency affecting the safety of the State or its vital interests—

> " it being understood that the principles of the present Statute must be observed to the utmost possible extent."

They also provide that no State is bound to afford transit for passengers whose admission into its territory is forbidden or for goods of a kind of which the importation is prohibited. They also provide that no obligation is contracted by signatories in respect of the goods or nationals of a non-contracting State. Article 32 provides that :

> " this Statute does not prescribe the rights and duties of belligerents and neutrals in time of war. The Statute shall, however, continue in force in time of war so far as such rights and duties permit."

If any dispute arises concerning its interpretation, the dispute is to be submitted to the technical Committee of the League on Communications and Transit, and if not thus settled, to arbitration, unless the parties agree to lay it before the Permanent Court of International Justice.

Article 36 provides that :

> " During the course of the arbitration the Parties, in the absence of any contrary provision in the terms of reference, are bound to submit to the Permanent Court of International Justice any question of international law or question as to the legal meaning of this Statute the solution of which the arbitral tribunal, at the request of one of the Parties, pronounces to be a necessary preliminary to the settlement of the dispute."

All the provisions relating to disputes contained in Articles 35 and 36 of the statute are of particular interest.

The convention up to the present time has been signed by twenty-two countries.

The Convention and Statute on the International Régime of Maritime Ports.

Like the instruments dealing with the international régime of railways, the convention on the international régime of maritime ports is divided into the convention proper, which deals primarily with matters of procedure, and the statute, which contains the substantive agreements arrived at by the conference.

The fundamental principles of the statute, which consists of twenty-four Articles, are equality of treatment in, and freedom of access to, maritime ports for the sea-going vessels of all contracting parties. It is worth noting that the

principle of reciprocity is strictly observed throughout all the transit conventions prepared by the conferences on communications and transit. Maritime ports are defined to mean—

> " All ports which are normally frequented by sea-going vessels and used for foreign trade."

This definition is intended to exclude naval and fishing ports.

With regard to equality of treatment, the contracting States undertake to grant to the nationals, property, and flags of other contracting States the same rights that they grant to their own nationals, property, and flags, in all that concerns freedom of access to, and the use of, ports, particularly facilities such as berthing, loading, unloading, the levying of dues and tariffs in the name and for the profit of the Government, public authorities, concessionaires or establishments of any kind. In the application of customs or analogous duties no distinction is to be made between the flag of any contracting State and that of the State under whose sovereignty the port is placed. Article 7 provides that unless there are special reasons justifying exception—

> " the Customs duties levied in any maritime port . . . may not exceed the duties levied on the other Customs frontiers of the said State, on goods of the same kind, source or destination."

The statute has no reference to the use of ports by warships, vessels performing police functions, or fishing vessels, and it provides by Article 9 that it does not " in any way apply to the maritime coasting trade." In the Final Act of the conference, however, there is a strong recommendation that :

> " all States, including those which are not Members of the League of Nations, should accept the fundamental principles of the Statute and should refrain from inequitable economic measures such as, in particular, an abusive extension of the conception of maritime coasting trade."

The general provisions, including the provisions relating to settlement of disputes, are almost identical, *mutatis mutandis*, with those of the statute on the international régime of railways.

The convention up to the present time has been signed by sixteen States.

Convention relating to the Transmission in Transit of Electric Power.

This convention lays down certain governing principles designed to promote the conclusion of agreements between States concerning the transmission in transit of electric power. It is founded on an undertaking by each contracting State—

> " on the request of any other Contracting States, to negotiate, with a view to the conclusion of agreements for ensuring the transmission in transit of electric power across its territory."

It provides that the technical methods adopted for the purpose of carrying out this undertaking shall be based exclusively upon technical considerations which " might legitimately be taken into account in the case of similar internal transmissions," subject to the proviso that in exceptional cases political frontiers may be taken into account provided that the technical methods referred to are not materially affected thereby.

It further provides that the transmission in transit of electric power shall not be subject to special dues or charges solely on the ground that such transmission is effected in transit.

The convention has up to the present time been signed by fourteen States.

Convention relating to the Development of Hydraulic Power affecting more than one State.

Like the previous convention, this convention is intended to promote special partial agreements between States, in this case for the development of hydraulic power. It does not in any way affect—

> "the right belonging to each State, within the limits of international law, to carry out on its own territory any operations for the development of hydraulic power which it may consider desirable;"

but it obliges the contracting States to agree to any international investigation concerning the development of hydraulic power which involves or may involve joint international action. It also contains a series of provisions intended to protect the interest of States to which the operations for the development of hydraulic power may cause prejudice, and stipulates that the technical methods adopted in the agreements so come to shall be based exclusively upon technical considerations.

Neither this nor the preceding convention provides any compulsory procedure for the settlement of disputes.

The convention up to the present time has been signed by thirteen States.

II. Preparatory Work in 1923–4.

During the year 1923–4 a large amount of work has been done by various international bodies, principally commissions or other organs of the League of Nations, on subjects in connexion with which it is proposed that general international conventions should in due course be drawn up and signed. Most of the work done during this year has been a continuation of a study of the subjects which had been already begun at an earlier date. On some questions the work is now well advanced and it is to be anticipated that draft conventions will be laid before the Governments, at special conferences or otherwise, within a short time. On other subjects the difficulties to be overcome have been greater, and further study is required before it will be possible to proceed to the stage of drafting conventions for Government consideration.

This is particularly true of a number of economic subjects which are under examination by the Financial and Economic Committees of the League of Nations. These subjects include the difficult problems of double taxation, and of fiscal evasion, and a proposal for the unification of national legislation concerning bills of exchange and promissory notes. Special expert bodies have been set up by the Economic and Financial Committees of the League to investigate these questions, but it is not anticipated that they will be able to make positive proposals for a considerable time.

Similarly, two projects for new conventions concerning public health are still the subject of expert investigation by the Health Organization of the League. One of these projects relates to the transmission of infectious disease by international waterways, another to the sanitary control of ports.

Another group of questions which are under consideration are partly economic and partly social in character: for example, the reform of the calendar and the establishment of a fixed date for Easter; the making of an international agreement concerning summer time; the improvement of existing arrangements concerning international motor licences. These questions are at present being considered by the Transit and Communications Committee of the League of Nations and by special sub-committees which it has established.

The League of Nations Committee on Intellectual Co-operation has also put forward a proposal for a new international convention concerning the international exchange of official publications. This proposal will be examined by a conference of experts in the course of the next few months.

On other subjects it is hoped that new conventions will actually be signed during 1924–5. The first of these relates to the illicit traffic in opium and other dangerous drugs. A special committee is at present preparing a programme for two international conferences which are to meet in Geneva in November, 1924, and at which it is expected that new agreements will be made for the restriction of the production of raw opium and coca leaves, and the suppression of opium smoking in the Far East. Similarly, the Armaments Commissions of the League are engaged in preparing draft treaties concerning the traffic in arms and the private manufacture of arms and munitions. The new draft Convention on the Arms Traffic is designed to take the place of the Convention of St. Germain of 1919, to which no important Government has yet given its ratification.

Full information concerning the work done up to the present time on all the subjects mentioned above can be found in the reports presented to the Council of the League of Nations and printed in the *League of Nations Official Journal.*

The conference of the International Labour Organization which is to meet in Geneva in June, 1924, will have under consideration three new conventions. The first of these is designed to abolish night work in bakeries; the second to secure equal treatment within the territory of each contracting party for foreigners and nationals of other parties in respect of benefits accruing from legislation for workmen's compensation; the third relates to the establishment of a weekly suspension of twenty-four hours in glass-making industries in which tank-furnaces are used. All these three draft conventions are laid before the Labour Conference by the Governing Body of the International Labour Organization, who suggest that they should be considered both at the Labour Conference of 1924 and at that of 1925. It is probable, therefore, that none of them will be signed until 1925.

With regard to the first of them, it was objected by the Danish Government that as the practice of night work in bakeries did not involve any element of international industrial or commercial competition there was no need for a convention on the subject. The Governing Body of the International Labour Organization considered this objection, but rejected it.[1]

P. J. B.

[1] The text of the three draft conventions, together with questionnaires on the subjects with which they deal and the replies of the Governments to these questionnaires can be found in Reports Nos. II, III, and IV, International Labour Conference, 6th Session, Geneva, June, 1924. (These Reports can be obtained from the International Labour Office, 26 Buckingham Gate.)

DECISIONS, OPINIONS, AND AWARDS OF INTERNATIONAL TRIBUNALS IN 1923–4

JUDGMENTS AND ADVISORY OPINIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

DURING the period under review (May, 1923—April, 1924) the Permanent Court pronounced judgment in the first international dispute which has come before it, gave three advisory opinions on questions submitted by the Council of the League of Nations, and refused to advise on one question so submitted.

JUDGMENT IN THE CASE OF THE S.S. *WIMBLEDON* (AUGUST 17, 1923) [1]

The combined effect of Article 386 of the Treaty of Versailles and Article 37 of the Statute of the Permanent Court is to entitle "any interested Power" to appeal to the Court in the event of any violation or dispute as to the interpretation of the Section of the Treaty dealing with the Kiel Canal (Part XII, Section VI, Articles 380–6).

The Section commences with the following provision (Article 380):

> "The Kiel canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."

The other Articles of the Section contain detailed provisions intended to assure, facilitate, and regulate the exercise of this right of passage.

In March, 1921, at a time when a war between Poland and Russia in which Germany had declared herself neutral had already resulted in an Armistice embodied in peace preliminaries but when the final Peace Treaty had not been made, the British steamer *Wimbledon*, chartered by a French company and carrying a consignment of munitions which had been acquired by a Polish mission at Salonica and consigned to the Polish military mission at Danzig, was refused passage through the Kiel Canal in alleged execution of Germany's duty as a neutral and of her neutrality regulations. Diplomatic representations by France proving unavailing, the ship, after some delay, proceeded to her destination by way of the open sea. Subsequently (January 16, 1923), Great Britain, France, Italy, and Japan, following a course already suggested by Germany, applied to the Permanent Court. They asked for a judgment declaring that the refusal to allow the *Wimbledon* to pass the canal was a violation of Article 380 of the Treaty of Versailles and for damages. Poland asked to intervene and was admitted in the capacity of a State party to the Treaty which

[1] Text of the judgment: Publications of the Court, Series A (*Collection of Judgments*), No. 1. Documents of the written procedure: Series C (*Acts and Documents relating to Judgments and Advisory Opinions given by the Court*), 3rd Session, Additional Volume.

the Court was to interpret.[1] Germany appeared to the summons of the Court and a German judge, Herr Schücking, was duly added to the Court under Article 31 of its Statute.

By a majority composed of nine judges (Loder, Weiss, Finlay, Nyholm, Moore, de Bustamante, Altamira, Oda, and Wang) the Court gave judgment for the plaintiffs and awarded as damages to France (for the French company interested) the cost of freight during eleven days demurrage and two days deviation and the cost of fuel, with interest from the date of judgment until payment; the other plaintiff Powers were allowed as parties in virtue merely of their interest in the execution of the Treaty provisions relating to the Kiel Canal.

The judgment declares that "the terms of Article 380 are categorical and give rise to no doubt." The Kiel Canal has ceased to be an internal waterway, navigable by ships of other States at the discretion of Germany, and has become

> "an international waterway intended to provide, under treaty guarantee, easier access to the Baltic for the benefit of all nations of the world."

The right of all vessels to use the canal is subjected only to the one express condition that they must belong to States at peace with Germany. From the existence of this condition it appears that the Treaty does not ignore the possibility of war. A war in which Germany is a belligerent entitles her to close the canal to enemy ships. If it had been the intention that the existence of a war in which Germany was neutral should also modify the conditions of access to the canal, this also would have been expressly provided. The right which Germany claims is not a "personal and imprescriptible" right, essential to her sovereignty, which she must be held to have been incapable of surrendering. For a State to undertake to perform or refrain from certain acts is not an abandonment of sovereignty but the exercise of an attribute of sovereignty. The rules and practice established in regard to the Suez and Panama Canals show that—

> "the use of the great international waterways whether by belligerent men of war or by belligerent or neutral merchant ships carrying contraband, is not regarded as incompatible with the neutrality of the riparian sovereign."

It is, therefore, concluded that—

> "in war time as in peace time the Kiel Canal should have been open to the *Wimbledon* just as to every vessel of every nation at peace with Germany."

Dissenting opinions in favour of Germany were delivered by the judges Anzilotti and Huber jointly and by Herr Schücking.

The two former judges consider that the Kiel Canal provisions of the Treaty of Versailles, like any ordinary commercial or transit convention, and like the articles of the Treaty dealing with other German waterways, should be regarded as contemplating normal circumstances only, i. e. a state of peace, and as creating for the Kiel Canal a legal status resembling that of internal waterways of international concern. They accordingly do not affect Germany's rights and duties as a neutral in the case of war between other powers. The detailed provisions which follow the general statement of principle in Article 380 only lay down rules for ordinary peace-time traffic through the canal; they expressly

[1] Article 63 of the Statute of the Court.

allow Germany certain necessary powers in regard to such traffic, but *per contra* Germany is allowed no special control over traffic interesting belligerents in a war in which she is neutral, the canal is not neutralized or in any way guaranteed against the action of such belligerents, and, in fact, there is an absence of special arrangements for the case of war, such as in different ways exist in regard to the Suez and Panama Canals, which is inconsistent with holding that Germany has an absolute duty to keep the canal open in time of war to all ships except those of a Power at war with herself. The mention of ' nations at peace with Germany ' in Article 380 is too weak a ground to sustain the inference drawn from it by the majority of the Court. Grammatical interpretation of contracts, and especially of treaties, must not be pushed to the point at which it produces consequences which are contradictory or impossible or manifestly go beyond the intention of the parties. On this view the only question for the Court was whether the application of the German neutrality regulations to the canal was an arbitrary act calculated unnecessarily to impede traffic, and in the circumstances of the case the answer must be in the negative.

Herr Schücking based his opinion on the view that the Treaty has subjected the Kiel Canal to a "servitude." A servitude resting on the territory of a State (*a*) must be interpreted so as to limit as little as possible that State's sovereignty ; (*b*) can only be enjoyed by the beneficiary States subject to the obligation *civiliter uti*, i. e., the vital interests of the territorial sovereign must be respected. Germany had a vital interest in observing a strict neutrality in the Polish-Russian war, and has nowhere expressly renounced the right to subject the canal to special measures in time of war or neutrality. To have allowed the *Wimbledon*, carrying war material consigned by one Polish authority to another, to pass the canal, would, moreover, have been a breach of neutrality towards Russia. It cannot have been the intention, and it could not be the effect, of the Treaty of Versailles to bind Germany to violate the rights of States not parties to the Treaty.

Advisory Opinion No. 5 : Status of Eastern Carelia (July 23, 1923).[1]

The Court refused to answer the question whether certain articles of the Treaty of Dorpat between Finland and Russia (October 14, 1920) and a declaration by Russia described as annexed to the Treaty, imposed upon Russia *vis-à-vis* Finland the obligation to allow a régime of autonomy to the Russian territory known as Eastern Carelia, i. e., whether the régime to be applied to that territory was a matter of treaty agreement between Finland and Russia or a purely internal Russian question. The long-standing Finno-Russian dispute on this subject had been brought before the Council of the League by Finland, but Russia had refused to consent to action by the League, and the Council had eventually decided to address to the Court the above question as to the nature of the dispute.

Russia refused the Court's request to assist the Court in the examination of the question.

The Court found that it was asked to give an opinion bearing upon an

[1] Text of Opinion : Publications of the Court, Series B, No. 5. Acts and Documents relating thereto : Series C, No. 3, 3rd Session, Vol. II.

actual dispute between a Member of the League and a State, not a Member of the League, which did not consent to settlement of the dispute through the League and was not bound so to consent. In these circumstances it was unable to give the opinion requested.

The Court further found that the question put was not one of abstract law, but rather one of fact. What did Finland and Russia agree to ? The abstention of Russia deprived the Court of the possibility of obtaining the evidence necessary to enable it to form a judicial opinion on this question of fact. Being a Court of Justice, it could not, even in giving advisory opinions, depart from the essential rules guiding its activity as a Court.

Four judges (Weiss, Nyholm, de Bustamante and Altamira) dissented from the views of the majority of the Court as to the impossibility of giving the opinion asked, but did not state their reasons.

Advisory Opinion No. 6: German Settlers in Poland (September 10, 1923).[1]

This case concerned the legality, in view of the terms of the so-called Polish Minorities Treaty (treaty between the Principal Allied and Associated Powers and Poland, giving effect to Article 93 of the Treaty of Versailles and signed at Versailles on the same day) of certain legislative and administrative acts of Poland. By these acts the Polish State assumed the ownership and expelled the holders (*a*) of farms held under contracts of sale of a special character (" Rentengutsverträge ") concluded with the German Colonization Commission before the Armistice, but not perfected by the final act of conveyance (" Auflassung ") before that date, and (*b*) of other farms originally held under a special form of lease from the Commission (" Pachtverträge ") where the lease was still unexpired but had after the Armistice been converted into a contract of sale of the above-mentioned special nature. In so acting, Poland purported to be assuming and exercising a proprietary right of the Prussian State (represented by the Colonization Commission) which had passed to her under Article 256 of the Treaty of Versailles, viz., the right to resume possession of farms held under a " Rentengutsvertrag " at any time until the final act of conveyance had been performed. The completion of the conveyance after the Armistice was maintained to be null and void.

The effect of the measures in question was the dispossession, without compensation, of a considerable number of German farmers who had been settled by the Commission in what was formerly German Poland and had become Polish nationals by the operation of the Treaty of Versailles. Petitions representing that the Minorities Treaty was thereby violated were presented to the League, under whose guarantee the stipulations of the Treaty which affect minorities are placed. They were examined, in the regular course of the procedure adopted by the Council, by a committee composed of three members of the Council and the committee called the Council's attention to the matter. Ultimately, in full agreement with Poland, the Council decided to seek the Court's advice.

The Court had first to consider a contention by Poland that the League was not competent to deal with the question at issue, at least in the form in which it

[1] Text of Opinion : Publications of the Court, Series B, No. 6. Acts and Documents relating thereto : Series C, No. 3, 3rd Session, Vol. III, Parts I and II.

presented itself. It unanimously decided that an issue had arisen of alleged infringement of the stipulations of the Minorities Treaty which assure to the minorities in Poland the same civil and political rights and the same treatment and security in law and fact as to other Polish nationals. The matter had been duly brought before the Council by at least three of its members in accordance with Article 12, paragraph 2, of the Treaty, and the Council was entitled to take the advice of the Court upon it.

On the merits of the case the Court unanimously advised that the measures complained of were a virtual annulment of legal rights possessed by the farmers under their contracts, and, being directed in fact against a minority and subjecting it to discriminating and injurious treatment to which other citizens holding contracts of sale or lease were not subject, were a breach of Poland's obligations under the Minorities Treaty. The date of entry into force of the Peace Treaty, not that of the Armistice, was the date at which sovereignty over the territory where the farms are situated, and the proprietary rights of the Prussian State within that territory, passed to Poland. In the interval Prussia continued competent to effect transactions falling within the normal administration of the country. Prussia had no arbitrary right to resume possession of the farms in question, but on the contrary, under the terms of the contracts and the rules of German law, was subject to an enforceable obligation to perfect the conveyance to the holders. The conveyances made during the Armistice were, therefore, valid. Private rights acquired under existing law do not cease on a change of sovereignty. Poland neither took from Prussia under Article 256, nor could derive from any other provision of the Peace Treaty, any right to dispossess the farmers in her own favour.

Advisory Opinion No. 7: Acquisition of Polish Nationality (September 15, 1923).[1]

This, like the preceding case, was a question of the interpretation of the Polish Minorities Treaty. By Article 4, paragraph 1, Poland—

> " admits and declares to be Polish nationals *ipso facto* and without the requirement of any formality persons of German, Austrian, Hungarian or Russian nationality who were born in the said territory of parents habitually resident there, even if at the date of the coming into force of the present Treaty they are not themselves habitually resident there."

Poland had adopted the view that for a person to acquire Polish nationality under this provision it was necessary that his parents should have been habitually resident in the territory in question not merely at the date of his birth but also at the date of entry into force of the Treaty (January 10, 1920). Representations to the effect that this interpretation violated the rights of the German minority in Poland were made to the Council of the League on behalf of the persons affected. It was thereupon contended by Poland that the Council was incompetent to consider the complaint. Its competence was derived from Article 12, and was thereby limited to cases of infringement of " the stipulations in the foregoing Articles, *so far as they affect persons belonging to racial, religious or linguistic*

[1] Text of Opinion: Publications of the Court, Series B, No. 7. Acts and Documents relating thereto: Series C, No. 3, 3rd Session, Vol. III, Part II.

minorities." A person must be a Polish national in order to belong to a minority. The persons referred to in Article 4, could not be considered to be Polish nationals since the question at issue was whether they were or were not Polish nationals; they could not, therefore, be regarded as members of a minority and the League accordingly could not deal with their case.

The Court unanimously rejected the Polish interpretation of both Articles 12 and 4.

On the question of competence (Article 12), the Court called attention to the facts that the Minorities Treaty was concluded in order to carry out the obligation undertaken by Poland, under Article 93 of the Treaty of Versailles, of accepting provisions " to protect the interests of *inhabitants* who differ from the majority of the population in race, language or religion;" that the same word " inhabitants " is employed in the preamble of the Minorities Treaty; that in Article 2 rights are guaranteed to all " inhabitants " without distinction of birth, *nationality*, language, race or religion; and that Article 12 makes no reference to political allegiance. The term " minority " is, therefore, not used in the Treaty in the narrow sense suggested by Poland. The Treaty " does not exclusively contemplate minorities composed of Polish nationals or inhabitants of Polish territory;" the intention realized by inserting in it stipulations (Articles 3–6) relating to the acquisition of Polish nationality, which were already in part contained in the Treaty of Versailles, was to assure their execution by bringing them under the guarantee of the League and the terms of Article 12.

The Polish interpretation of Article 4 was held to be contrary to its natural meaning, which required only habitual residence of the parents at the date of birth of the person in question; it amounted to the imposition of an additional condition.

Lord Finlay in a supplementary opinion expressed the view that the question of competency could have been answered without defining the meaning of the term " minorities." The Polish contention would fail, even if that term meant a minority of nationals, since the persons contemplated by Article 4 are declared by it to be *ipso facto* Polish nationals and Poland could not set up her own wrongful insistence upon an unnecessary condition as justifying the view that they were not Polish nationals.

Advisory Opinion No. 8: Polish-Czecho-Slovak Frontier (December 6, 1923).[1]

In this case the Court was called upon to examine a long series of transactions relating to the fixing of a small part of the frontier between Poland and Czecho-Slovakia and to advise as to the legal position resulting therefrom. The matter had been referred to the Council by the Conference of Ambassadors, the competent authority to settle the frontier, with the request that the Court's opinion might be sought. A unanimous opinion was expressed by the Court and accepted as the basis of settlement. The points dealt with in the opinion are not of sufficient general interest to be summarized here.

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[1] Text of Opinion: Publications of the Court, Series B, No. 8. Acts and Documents relating thereto: Series C, No. 4, 4th Session.

ANGLO-AMERICAN PECUNIARY CLAIMS ARBITRATION AWARD

ROBERT E. BROWN CLAIM

Arbitrators :

HENRI FROMAGEOT, EDWARD A. MITCHELL INNES, K.C., AND ROBERT E. OLDS.

Counsel :

For the U.S.A. F. K. NIELSEN (United States Agent) and STANLEY H. UDY.

For Great Britain. Sir CECIL HURST, K.C. (British Agent) and HOLMAN GREGORY, K.C.

THE United States claims £330,000, with interest, from Great Britain on account of the alleged denial of certain real property rights contended to have been acquired in 1895, by one Robert E. Brown in the territory of the South African Republic which was conquered and annexed by Great Britain on September 1, 1900.

The material facts are as follows :

Brown, an American citizen, and a mining engineer by profession, went to South Africa in the year 1894. He became interested in gold mining prospects, and in 1895, devoted particular attention to a piece of property known as the Witfontein farm through which, in his judgment, as well as in that of many others, the principal gold-bearing reef of that region was supposed to run. Under the prevailing system governing the disposal and acquisition of mining rights, the State, being the owner of all minerals, subject to certain preferential rights of the land proprietors, was accustomed from time to time by proclamation, to throw open for the prospecting and location of mining claims specified tracts of land. Such tracts were thereby formally designated as public goldfields, and in accordance with the terms of the proclamations, any and all persons were privileged to apply for prospecting licences to be issued by an official designated as the Responsible Clerk of the district in which the land lay.

On June 18, 1895, a proclamation was duly issued by the State President declaring the eastern portion of the Witfontein farm a public digging under the administration of the Responsible Clerk at Doornkop, such proclamation to take effect on July 19, 1895 (Memorial, p. 54). There was apparently wide interest in this field, and many individuals and corporations proceeded to take advantage of the proclamation. Brown made elaborate preparations for the opening by placing on the land a large number of agents, and among other things, arranged to transmit by heliograph to Witfontein from Doornkop, about twenty miles away, the news of the actual granting of licences so that his agents might act without delay and stake out claims in advance of all competitors. These arrangements being perfected, Brown himself appeared at the office of the Responsible Clerk at Doornkop at 8.30 o'clock on the morning of July 19, 1895, and made a formal application for 1,200 prospecting licences. The Clerk declined to issue the licences, and postponed further action until 10 o'clock of the same morning, stating that he was awaiting definite advices from the seat of government. Brown thereupon handed to the Clerk a written demand

for 1,200 licences (Memorial, p. 88). Shortly thereafter, and before 10 o'clock, the Clerk received a telegram from the seat of government announcing the withdrawal of the proclamation under which Witfontein had been thrown open as a public digging. Brown again protested and made a tender of the money for the licences, which was refused. He then heliographed his agents at Witfontein to go ahead and peg out the claims (Memorial, p. 61), himself proceeding to the scene where he arrived about noon.

Pursuant to his instructions, 1,200 mining claims were in fact pegged, and Brown subsequently asserted title to them on the ground that the withdrawal of the original proclamation was invalid and that the Clerk had no right to refuse issuance of the licences. Other parties acted in the same manner (Memorial, p. 64).

It appears that on the day preceding the opening of Witfontein under the proclamation, to wit: on July 18, 1895, the Executive Council at Pretoria, by resolution, provided for the suspension of the proclamation (Memorial, p. 83); and on July 20, 1895, the State President, on the advice of the same Council, caused a second proclamation to be published in the *Official Gazette*, adjourning the opening of Witfontein for the period of fourteen days, to wit: until August 2, 1895 (Memorial, pp. 81–2).

On July 22, 1895, Brown began a suit in the High Court of the South African Republic demanding the licences to cover the 1,200 claims which he had in fact already pegged off (Memorial, p. 52).

On July 26, 1895, the Second Volksraad, one of the two legislative chambers of the Republic having jurisdiction over these matters, adopted the following resolution approving the action of the Executive department in withdrawing the original proclamation and in issuing the second proclamation (Memorial, p. 85):

> "The Second Volksraad, regard being had to the communication of the Government dated July 26, 1895, in the matter of the provisional suspension of the proclamation of Witfontein, No. 572, district Krugersdorp, Luipaards Vlei, No. 682, district Krugersdorp, and Palmietfontein, No. 697, district Potchefstroom, and regard being further had to the Executive Council Resolution Article 516, of to-day's date, whereby a certain draft resolution is submitted by the Executive Council to the Honourable the Second Volksraad for approval and acceptance;
>
> "Resolves to agree to the proposal of the Executive Council contained in the said resolution and further resolves to accept the said draft resolution as submitted by the Executive Council as the resolution of the Second Volksraad."

On August 30, 1895, a third proclamation was issued by the State President further adjourning the Witfontein opening until August 30, 1895 (Memorial, p. 86).

Meanwhile an entirely new plan, for distributing mining claims by lot, was drawn up on August 15, 1895 (Memorial, p. 165; Answer, p. 213); and on August 20, 1895, the regulations for drawing by lot were made specifically applicable to Witfontein (Memorial, p. 168). The claims of Witfontein were accordingly disposed of under the lottery plan.

The defendants in the suit begun by Brown, being the State Secretary and the Responsible Clerk, answered on August 14, 1895, setting up the resolutions and proclamations above referred to (Memorial, p. 55). In October, 1895, Brown filed in the same action, a claim in the alternative for damages amounting to £372,400. He also filed a replication asserting the invalidity of the proclamations and resolutions relied upon by the defendants (Memorial, p. 58). The defendants then interposed a formal answer to the alternative claim. The case came on for trial November 15, 1895 (Memorial, p. 60); and on January 22, 1897, judgment was given in Brown's favour in the following terms:

"Be it Hereby Ordered

That judgment be and is hereby granted in favour of the Plaintiff with the costs of this action.

"The Responsible Clerk at Doornkop is ordered to issue Prospecting Licenses to the Plaintiff on payment of the necessary moneys, in order to be enabled thereunder to peg 1,200 claims on the eastern and proclaimed portion of the farm Witfontein." (Memorial, pp. 74–5.)

The opinion of the Court was delivered by Chief Justice Kotze (Memorial, p. 20). A separate opinion reaching the same conclusion was filed by one of the other members of the Court, Justice Morice (Memorial, p. 40). Briefly, the Court held: That the original proclamation was valid and duly published according to law; that it could not be withdrawn or set aside save by a new proclamation duly published in the same manner; that the order suspending the operation of the proclamation not being published in the *Official Gazette* until the day after the date fixed for the opening, was ineffectual; and that there was consequently no legal warrant for refusing the licences on July 19, 1895. The concluding paragraph of the opinion by the Chief Justice was as follows:

"The plaintiff is entitled to be placed by the Court in as nearly as possible the same position in which he would have been on the morning of the 19th July, 1895. He has framed his claim, by means of a subsequent amendment, in the alternative, that the Responsible Clerk at Doornkop shall be ordered, upon receipt of the necessary moneys, to issue to the plaintiff a licence for 1,200 prospecting claims upon the proclaimed portion of Witfontein, or otherwise that the sum of £372,400 shall be paid to him as and by way of damages. The plaintiff is clearly entitled to the licence, whereby he will be able to peg off 1,200 prospecting claims on the eastern portion of Witfontein. Nothing definite was said during the argument about the measure of damages, and no special grounds have been submitted to us on behalf of the Government, why, in the event of the Court deciding in favour of the plaintiff, it would be impossible for him to proceed to peg off the 1,200 claims, which he has already informally pegged off. The evidence so far as it relates to this point, leaves no doubt that if the plaintiff had obtained the licence to which he was entitled, he would have been able to have properly pegged off the 1,200 prospecting claims, which as a matter of fact he did peg off. That certain persons also lay claim to some of these 1,200 prospecting claims, by virtue of *vergunningen* is a question which can at some

future time be settled between them and the plaintiff, and if need be, decided by the Court. It cannot affect our judgment in this case. Should it appear that it has become impossible for the plaintiff to peg off under the prospecting licence the 1,200 specific claims, either in whole or in part, which he had already pegged on the 19th July, 1895, it will become necessary for the Court to determine the amount of damages. We can do no more at present, for although the plaintiff is entitled to compensation against the State, by reason of the unlawful conduct of an official acting upon instruction of the Government, the onus of showing, with more or less definiteness and as nearly as possible the amount of the damages lies on him, and the evidence, which he has submitted on this point, is too vague and uncertain to enable us to base any satisfactory calculation thereon. In the event of the Court being called upon to fix the damages later on, further and more satisfactory evidence with respect thereto will, after notice served upon the Government, have to be laid before us. For the present there must be judgment in favour of the plaintiff, with costs. The Responsible Clerk at Doornkop is ordered to issue to the plaintiff upon the due payment of the necessary amount, a prospecting licence for 1,200 claims on the eastern and proclaimed portion of the farm Witfontein." (Memorial, pp. 39–40.)

Justice Morice, while concurring in the judgment, took the position that Brown acquired no right to specific claims by reason of the actual pegging after the licences had been refused him on July 19, 1895 (Memorial, p. 48).

At the time the judgment was rendered, Brown was not in South Africa, and his interests were in the hands of one Oakes, who, in his behalf, proceeded on January 25, 1897, to tender £300 for 1,200 licences (Memorial, p. 93), whereupon, after some delay in order to permit the Responsible Clerk to receive final instructions, on February 9, 1897, the licences for 1,200 prospecting claims good for one month were issued, bearing however, the following endorsement:

"These claims cannot be renewed as they encroach upon the 'owners' and 'vergunning' cls." (Memorial, p. 97.)

Under this licence, though the evidence on the point is doubtful, it would seem that the 1,200 claims pegged in the first instance were re-pegged (Memorial, pp. 94–5; further British Memorandum, pp. 12–15).

The customary privilege of renewal being denied, Brown's representative found the licence of no practical value, and was obliged to fall back upon the alternative claim for damages.

At this point it becomes necessary to note the wider significance of the decision in Brown's case. It will have been observed that the resolution of the Second Volksraad above quoted not only approved the second proclamation of the State President, but declared in effect that all peggings under the original proclamation were unlawful and that no person who had suffered damage in the circumstances should be entitled to compensation. It was contended by the defendants that this resolution of a single chamber had the legal force of a law, and in this connexion Article 32 of Law No. 4 of 1890, was invoked, reading as follows:

" The legal force of a law or resolution published by the State President in the *Gazette* may not be disputed saving the right of the people to make petitions with regard thereto."

In answer to this contention, it was pointed out that under the Grondwet or Constitution of the Republic, the terms of the Gold Law under which the original proclamation had been issued, could not be altered except by *legislative* enactment. The issue was thus sharply raised as to whether the High Court had the duty and power to uphold the Constitution by setting aside legislative enactments and resolutions in conflict therewith.

In the previous case of McCorkindale's Executors *v.* Bok (Answer, p. 263), Chief Justice Kotze himself had denied the power of the Court in this respect, but in subsequent decisions (Memorial, p. 25), he had stated that the views expressed in the McCorkindale case could no longer be supported. He now undertook, in an opinion which exhibits great industry and ability, to deal with this constitutional question at length, and reached the conclusion, which accords with American practice, that the Constitution was supreme and that acts in conflict therewith must be declared void by the Court. Even before this decision, and while the case was pending, the President of the Republic had interviewed the Chief Justice and threatened to suspend him from office in the event of his failure to uphold the right of the Executive and Legislative departments to override the Constitution (Memorial, p. 143). There now ensued an amazing controversy between the Court and the Executive. We do not propose to examine the details of this unique judicial crisis. It is sufficient to note that the result was the virtual subjection of the High Court to the executive power. An obedient legislature immediately enacted, at the demand of the Executive, the so-called testing law, dated February 26, 1897, and effective March 1 of that year, the terms of which were as follows :

" 1. As long as the People has not clearly made it known to the satisfaction of the First Volksraad that it wishes to alter the existing condition the existing and future laws and Volksraad Resolutions shall be recognised and respected by the Judiciary in agreement with Article 80 of the Grondwet (Constitution) of 1896, and the Judiciary has not the competency to refuse to apply a Law or Volksraad Resolution because such law or resolution is, in the opinion of the Judge either in form or substance in conflict with the Grondwet, in other words the Judiciary shall not have the competency and has never had it, either by the Grondwet (Constitution) or by any other law to arrogate to itself the so-called testing-right.

" 2. The Judges, Landdrosts and other members of the Judiciary shall, in future, take the following oath before accepting office :

" ' I promise and swear solemnly to act faithfully to the people and the laws of this Republic, and in my position and office to act justly, equitably, without respect of persons in accordance with the Laws and Volksraad Resolutions and to the best of my knowledge and conscience ; not to arrogate to myself any so-called testing right ; not to accept from any one any gift or favour if I have reason to suspect that it was made or shown to me to persuade me in my judgment or action in favour of the

person so giving or favouring, and that in my other capacities than as Judge I shall obey according to Law the commands of those placed over me, and, in general, my only object shall be the maintenance of law, justice and order, to the furtherance of the prosperity, welfare and independence of law and people. So truly help me God Almighty.'

" The Members of the High Court and the Landdrosts shall take the oath before the President and Members of the Executive Council.

" 3. The Judge who does not act in accordance with Article 1 of this Law shall be considered to have committed an official offence as mentioned in Article 86 of the Grondwet of 1896.

" 4. The President is hereby authorised to ask the present Members of the Judiciary, or to cause them to be asked, if they consider it to be in accordance with their oath and their duty to decide in accordance with the existing and future Laws and Volksraad Resolutions, and not to arrogate to themselves the so-called right of testing, and further instructs the President to discharge from their office those Members from whom he has received either a negative or, in his opinion, an insufficient, or within a specified time, no answer at all.

" 5. Volksraad Resolution shall, in this Law, be understood to mean both Resolutions of the old Volksraad and Resolutions of the First and also of the second Volksraad, which are in force in virtue of Article 31, Law No. 4, 1890, now Article 79 of the Grondwet of 1896. ' People ' shall be understood to mean the fully enfranchised Burghers of the South Africa Republic.

" 6. This Law shall not impair rights which may have been obtained by sentences of the High Court before the passing of this Law.

" 7. This law shall come into operation immediately after publication in the *Staatscourant*." (Answer, pp. 313–15.)

The enactment of this law was the prelude of the state of so-called legal anarchy, which endured for approximately a year, and eventually led to the armed intervention of Great Britain and the ultimate annexation of the South African Republic. In this period a vigorous but vain fight for the independence of the judiciary was made by the bench, the bar, and the press (Memorial, pp. 103–45). The Executive authority pursued its main object relentlessly and on February 16, 1898, the recalcitrant Chief Justice was finally dismissed from office by the President, acting under the provisions of the Law of 1897 (Memorial, p. 112). One of his associates also resigned, but the other Justices of the Court seem to have accepted the situation. Throughout this controversy the Brown case was referred to as the turning point, and the 1897 law as the actual instrument by which the independence of the High Court was destroyed. At least so far as the " Uitlanders " were concerned there is much justification for the assertion that effective guarantees of property rights had disappeared, and that the capricious will of the Executive had become the sole authority in the land. That these intolerable conditions led directly to the war, in which the independence of the State itself was suppressed, is a matter of history.

In the meantime, reverting to the chronology of this litigation, Brown, being unable to find any other relief, proceeded, by motion in the original action, as suggested by the Chief Justice at the conclusion of his opinion, to bring up the

question of damages. Notice of the motion was given on December 10, 1897 (Memorial, p. 52). The case did not come on to be heard until March 2, 1898, after the dismissal of the Chief Justice and the reorganization of the Court with Justices sworn to abandon all right to test laws and resolutions by reference to the Constitution. The disposition to defeat Brown's claim at any cost was at once disclosed by the Government's attitude upon this hearing. Although Brown had been invited specifically by the High Court, in the event of his being unable to secure the claims, to proceed upon notice (Memorial, p. 40), for the purpose of bringing forward his alternative claim for damages, the Government now contended and the Court decided that such procedure was improper, and that the only way in which he could proceed was by the institution of a new suit for damages. It will be remembered that the alternative claim for damages had been made in the action and issue joined upon it. Furthermore the Court had permitted the same procedure by notice and motion in another suit brought by the Elias Syndicate on almost identical facts. This precedent was waived aside, as appears from the report of the hearing, on the ground that after judgment, the Responsible Clerk had, in the Elias Syndicate case, refused to issue the licences for the reason that there was no open land to which they could be made applicable, while in the Brown case, the Clerk had, in fact, issued a licence (Memorial, pp. 77–9). Another possible distinction was rather vaguely referred to, based upon the difference in wording of the two judgments. The Brown judgment, as above indicated, did not embody the Chief Justice's direction to proceed by notice for the determination of damages, while the Elias Syndicate judgment contained a clause reserving the question of damages (Memorial, p. 224). On the strength of these technical distinctions the Court declined to permit Brown to follow the course adopted in the other litigation and suggested by the former Chief Justice ; and judgment was delivered denying the motion and imposing costs, with leave to start a new action (Memorial, p. 80).

The significance of this disposition of the motion by the reconstituted High Court has been the subject of much argument. Brown's attorneys at the time took the position that the effect of this second order or judgment was to throw him out of court and deprive him of the benefit of his previous judgment. He was advised by counsel that in any new action instituted for damages the Government could plead the Volksraad resolutions, and that the new court would be obliged, under the oath provided in the 1897 law, to give the resolution full effect in any such suit begun at that time. It will be remembered that the Volksraad resolution heretofore quoted specifically provided that no compensation should be awarded to any person claiming to have been damaged by the withdrawal of the original proclamation ; and it was evidently the opinion of counsel that, there having been no judgment fixing the damages in the action wherein the licences were ordered to be issued, and no reference whatever to damages in that judgment, no protection would be afforded Brown under Article 6 of the 1897 Law, stating that rights obtained by sentences of the High Court before the passing of the law could not be impaired. At any rate, Brown did, upon advice of his counsel (Memorial, p. 146), abandon any further attempt to get relief in the courts. The advice was clear and emphatic. Attorney Hofmeyr said :

" Under the practice of our Courts it is not open to question that if Brown

had availed himself of the leave to issue a new summons the Government would have been entitled by their pleas to reopen the whole question in dispute, and have a retrial of the case, in other words, Brown's judgment of the 22nd of January which had not been appealed against would have been practically reopened. It was quite manifest that the attitude of the Court was distinctly hostile to Brown, and that the judgment was entirely unjustifiable. Such being the case the only conclusion to be arrived at is that it would have been quite impossible for Brown to obtain justice before a Court capable of giving such a decision. I, therefore, advised Brown that in my opinion it was quite useless for him to proceed further with his action or to expect redress from the Courts in the Transvaal. In other words, I believe that Brown did everything possible to obtain redress in the Transvaal Courts and it was only when it became perfectly apparent that the Court had determined not to grant him redress that he desisted on the advice of his Counsel and Solicitors from throwing away further money in the prosecution of his claim." (Memorial, p. 171.)

Mr. Wessels, counsel who argued the motion in Brown's behalf, gave his opinion as follows :

" In my opinion the decision was absolutely incorrect, absolutely against precedent, and perfectly unjustifiable. I now argue this way—if Brown has to encounter such extraordinary difficulty from the Court in a matter of mere formal procedure in an adjective question how much greater difficulty will he not have to encounter when he comes before the Court with a question where precedent is difficult, and where the substantive nature of his action will have to be tried." (Memorial, pp. 147–8.)

And there the matter rested, save for efforts made to obtain redress through diplomatic channels.

On October 28, 1898, Brown addressed a memorial to Her Majesty the Queen of England in her capacity as suzerain over the South African Republic (Answer, p. 357). This document was transmitted to the Secretary of State for the Colonies (Memorial, p. 154), and a reply dated December 15, 1898, stated that the proper course for Brown as an American citizen, was to bring the matter in the first instance to the notice of his own Government (Memorial, p. 155). Thereupon a memorial was in turn addressed to the Secretary of State of the United States, but no diplomatic action was taken at this stage, because the war intervened (Memorial, pp. 155–6).

After the annexation, and on September 8, 1902, another memorial was presented to the British Governor of the Transvaal Colony (Memorial, p. 151).

On July 17, 1902, the Attorney-General of the Colony gave an opinion, the material portion of which is as follows :

" It appears to me that Mr. Brown did not exhaust all his legal remedies as he did not issue a new summons as ordered by the Court.

" It is clearly impossible for your Excellency to comply with his request that licences be issued to him for the claims, as these claims are at present lawfully held by third persons under the Gold Law, and any interference with the title of the present holders would give rise to a general feeling

of insecurity. If Mr. Brown considers he has any legal right to obtain possession of the claims, or that he is entitled to damages the Supreme Court is open to him and he may take any proceedings he may be advised to." (Memorial, p. 158.)

The Government of the United States took up the question with the British Government, and on November 14, 1903, Lord Lansdowne from the Foreign Office wrote to the American Ambassador as follows :

" With reference to my note of the 23rd May last I have the honour to inform you that His Majesty's Government have given their most careful consideration to the claim of the late Mr. R. E. Brown, a United States citizen, against the Government of the late South African Republic.

" This claim appears to be based in the first instance on an alleged liability of the late Government of the Transvaal in damages for not granting a concession to Mr. Brown. The Court of the late Government refused redress and Mr. Brown's claim seems in the second instance to be based on an alleged wrong by reason of the corrupt or illegal action of the Court at the dictation of the Executive.

" As regards the first ground, His Majesty's Government are unable to find that it has ever been admitted that a conquering State takes over liabilities of this nature, which are not for debts, but for unliquidated damages, and it appears very doubtful to them whether Mr. Brown's claim could be substantiated at all or in any case for any substantial amount.

" As regards the second ground, it has never so far as His Majesty's Government are aware been laid down that the conquering State takes over liabilities for wrongs which have been committed by the Government of the conquered country and any such contention appears to them to be unsound in principle.

" In these circumstances, His Majesty's Government are unable to admit that the late Mr. Brown has any claim under international law against the Government of the Transvaal as successor to the Government of the South African Republic." (Memorial, p. 159.)

The claim was included in the schedule for submission to arbitration by this tribunal under Clause I, as a claim based on the denial in whole or in part of real property rights.

Two main questions arise on these facts :

First, whether there was a denial of justice in any event ; and

Second, whether in case a denial of justice is found, any claim for damages based upon it can be made to lie against the British Government.

On the first point we are of opinion that Brown had substantial rights of a character entitling him to an interest in real property or to damages for the deprivation thereof, and that he was deprived of these rights by the Government of the South African Republic in such manner and under such circumstances as to amount to a denial of justice within the settled principles of international law. We fully appreciate the force of the argument to the contrary which has been made on technical grounds. It may well be said that at no time did Brown acquire and hold any title or right to specific mining claims :

that at most he was entitled to a licence under which he might have located and become the owner of particular claims; that the actual pegging of claims in his behalf on July 19, 1895, was unsupported by any licence, and therefore had no legal effect; that the judgment of January 22, 1897, established merely his right to a licence and gave him no title to particular claims; that the alternative demand for damages was never liquidated; and that his legal remedies were not completely exhausted inasmuch as he never followed up the claim for damages by taking out a new summons in accordance with leave granted by the order of March 2, 1898. Notwithstanding these positions, all of which may, in our view, be conceded, we are persuaded that on the whole case, giving proper weight to the cumulative strength of the numerous steps taken by the Government of the South African Republic with the obvious intent to defeat Brown's claims, a definite denial of justice took place. We cannot overlook the broad facts in the history of this controversy. All three branches of the Government conspired to ruin his enterprise. The Executive department issued proclamations for which no warrant could be found in the Constitution and laws of the country. The Volksraad enacted legislation which, on its face, does violence to fundamental principles of justice recognized in every enlightened community. The judiciary, at first recalcitrant, was at length reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions. And in the end, growing out of this very transaction, a system was created under which all property rights became so manifestly insecure as to challenge intervention by the British Government in the interest of elementary justice for all concerned, and to lead finally to the disappearance of the State itself. Annexation by Great Britain became an act of political necessity if those principles of justice and fair dealing which prevail in every country where property rights are respected were to be vindicated and applied in the future in this region.

We do not regard as a decisive factor Brown's failure or inability to acquire specific claims, nor are we inclined to refine over a possible distinction between a right to specific real property, and the right to acquire such a right. We prefer to take a broader view of this situation, and we hold that through compliance with the laws and regulations in force on July 19, 1895, Brown acquired rights of a substantial character, the improper deprivation of which did constitute a denial of justice. Certainly the High Court, in its decision, so regarded them.

We are not impressed by the argument founded upon the alleged neglect to exhaust legal remedies by taking out a new summons. At best this argument would, under the Terms of Submission which control us here, be merely a matter to be taken into account as one of the equities, and could not be considered as in any sense a bar. In the actual circumstances, however, we feel that the futility of further proceedings had been fully demonstrated, and that the advice of his counsel was amply justified. In the frequently quoted language of an American Secretary of State:

> "A claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust." (Moore's *International Law Digest*, Vol. VI, p. 677.)

On this branch of the case we are satisfied, therefore, that there was a real denial of justice, and that if there had never been any war, or annexation by Great Britain, and if this proceeding were directed against the South African Republic, we should have no difficulty in awarding damages on behalf of the claimant.

Passing to the second main question involved, we are equally clear that this liability never passed to or was assumed by the British Government. Neither in the terms of peace granted at the time of the surrender of the Boer Forces (Answer, p. 192), nor in the Proclamation of Annexation (Answer, p. 191), can there be found any provision referring to the assumption of liabilities of this nature. It should be borne in mind that this was simply a pending claim for damages against certain officials and had never become a liquidated debt of the former State. Nor is there, properly speaking, any question of State succession here involved. The United States plants itself squarely on two propositions: first, that the British Government, by the acts of its own officials with respect to Brown's case, has become liable to him; and, second, that in some way a liability was imposed upon the British Government by reason of the peculiar relation of suzerainty which is maintained with respect to the South African Republic.

The first of these contentions is set forth in the Reply as follows:

> "The United States reaffirms that Brown suffered a denial of justice at the hands of authorities of the South African Republic. Had it not been for this denial of justice, it may be assumed that a diplomatic claim would not have arisen. But it does not follow that, as is contended in His Majesty's Government's Answer, it is incumbent on the United States to show that there is a rule of international law imposing liability on His Majesty's Government for the tortious acts of the South African Republic. Occurrences which took place during the existence of the South African Republic are obviously relevant and important in connection with the case before the Tribunal, but the United States contends that acts of the British Government and of British officials and the general position taken by them with respect to Brown's case have fixed liability on His Majesty's Government." (Reply, p. 2.)

Again on p. 8 of the Reply it is said:

> "The succeeding British authorities to whom Brown applied for the licences to which he had been declared entitled by the Court also refused to grant the licences, and therefore refused to carry out the decree of the Court which the United States contends was binding on them. And they have steadfastly refused to make compensation to Brown in lieu of the licences to which the Court declared Brown to be entitled, failing the granting of the licences."

The American Agent quoted these passages in his oral argument (transcript of 17th sitting, November 9, 1923, pp. 337–8), and disclaimed any intention of maintaining "that there is any general liability for torts of a defunct State" (*ibid.*, p. 339). We have searched the record for any indication that the British authorities did more than leave this matter exactly where it stood when annexation took place. They did not redress the wrong which had been committed nor did they place any obstacles in Brown's path; they took no action one

way or the other. No British official nor any British court undertook to deny Brown justice or to perpetuate the wrong. The Attorney-General of the Colony, in his opinion declared that the courts were still open to the claimant. The contention of the American Agent amounts to an assertion that a succeeding State acquiring a territory by conquest without any undertaking to assume such liabilities is bound to take affirmative steps to right the wrongs done by the former State. We cannot indorse this doctrine.

The point as to suzerainty is likewise not well taken. It is not necessary to trace the vicissitudes of the South African State in its relation to the British Crown, from the Sand River Convention of 1852, through the annexation of 1877, the Pretoria Convention of 1881, and the London Convention of 1884, to the definitive annexation in 1900. We may grant that a special relation between Great Britain and the South African State, varying considerably in its scope and significance from time to time, existed from the beginning. No doubt Great Britain's position in South Africa imposed upon her a peculiar status and responsibility. She repeatedly declared and asserted her authority as the so-called paramount power in the region; but the authority which she exerted over the South African Republic certainly at the time of the occurrences here under consideration, in our judgment fell far short of what would be required to make her responsible for the wrong inflicted upon Brown. Concededly, the general relation of suzerainty created by the Pretoria Convention of 1881 (Reply, p. 26), survived after the concluding of the London Convention of 1884 (Reply, p. 37). Nevertheless, the specific authority of the suzerain power was materially changed, and under the 1884 Convention it is plain that Great Britain as suzerain, reserved only a qualified control over the relations of the South African Republic with foreign powers. The Republic agreed to conclude no "treaty or engagement" with any State or nation other than the Orange Free State, without the approval of Great Britain, but such approval was to be taken for granted if the latter did not give notice that the treaty was in conflict with British interests within six months after it was brought to the attention of Her Majesty's Government. Nowhere is there any clause indicating that Great Britain had any right to interest herself in the internal administration of the country, legislative, executive, or judicial; nor is there any evidence that Great Britain ever did undertake to interfere in this way. Indeed, the only remedy which Great Britain ever had for mal-administration affecting British subjects and those of other powers residing in the South African Republic was, as the event proved, the resort to war. If there had been no South African War, we hold that the United States Government would have been obliged to take up Brown's claim with the Government of the Republic and that there would have been no ground for bringing it to the attention of Great Britain. The relation of suzerain did not operate to render Great Britain liable for the acts complained of.

NOW THEREFORE:

The decision of the Tribunal is that the claim of the United States Government be disallowed.

Dated at London, November 23, 1923.

The President of the Tribunal,

HENRI FROMAGEOT.

DECISIONS OF THE GERMAN-AMERICAN MIXED CLAIMS COMMISSION [1]

THE Mixed Claims Commission appointed in pursuance of an agreement between the United States and Germany, signed at Berlin on August 10, 1922, to pass upon the claims of American citizens for damages on account of seizures of property and of personal injuries, made or caused by the German Government or its agents since July 31, 1914, has recently rendered several decisions involving important principles of international law. At the outset the Commission by certain preliminary "administrative" decisions, laid down certain basic principles for the guidance of the American and German agents and of counsel in presenting their claims—which principles the Commission announced it would apply in rendering its decisions in the cases submitted to it.

In the first place, it announced that in the absence of controlling rules in the Treaty of Peace it would apply international conventions expressly recognized by the United States and Germany, international customs, rules of law common to the United States and Germany established either by statutes or judicial decisions, the general principles of law recognized by civilized nations, judicial decisions and the teachings of the most highly qualified publicists of all nations. It would not, however, be bound by any particular code or rules of law, but would be guided by justice, equity, and good faith. In determining the question whether the United States was injured through injury to one of its nationals, it would not recognize an injury when the person so injured was not a citizen of the United States at the time the injury was suffered even though he might have become naturalized subsequent to the injury. In short, while naturalization transferred allegiance, it did not carry with it existing State obligations. Any other rule, the Commission added, "would convert a nation into a claim agent in behalf of those availing of its naturalization laws to become its citizens after suffering injury."

Regarding the nature and extent of the damages for which Germany was responsible, the Commission laid down the rule that Germany could not be held responsible, as counsel for American claimants contended, for "all damage or loss in consequence of the war, no matter what act or whose act was the immediate cause of the injury." That responsibility must be limited to losses "caused by acts of Germany or her agents." This was the familiar rule of proximate cause which the parties to the Treaty had no intention of abrogating.

Whether the subjective nature of the loss was direct or indirect was immaterial, but the cause of the injury must have been the act of Germany or its agents; there must be a clear, unbroken connexion between Germany's act and the loss complained of. The Commission would not take into consideration what Lord Bacon called the "causes of causes and their impulsion one on another." Where the loss was far removed in causal sequence from the act complained of, it would not be competent for the Commission "to seek to unravel

[1] The decisions of the Commission are printed by the United States Government as official documents. The texts of the preliminary administrative decisions referred to in this note are published in the *American Journal of International Law*, Vol. 18 (1924) at pp. 175–86. The text of the *Lusitania* decision is to be found in the same volume at p. 361.

a tangled network of causes and effects, or follow through a baffling labyrinth of confused thought, numerous disconnected and collateral chains in order to link Germany with a particular loss." The contention of American counsel, said the Commission, would, if pressed to its logical conclusion, render Germany liable for all increased living costs, increasing income and profit taxes, increased railroad fares, freight rates and indeed all costs or consequences of the war however remote. But the rule laid down by the Commission would not exclude responsibility for indirect losses provided that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed.

Applying this rule of proximate cause to a particular case the Commission refused to allow a claim put forward by a group of American nationals for reimbursement for war risk insurance premiums paid by them for protection against certain stipulated hazards of war—against possible acts which never in fact occurred. Such claims, it held, were not within the jurisdiction of the Commission. It readily admitted that the premiums paid represented losses suffered as a consequence of the war, but they were not losses which could be attributed to Germany's act as a proximate cause. There was no more reason, it said, why such losses should be recovered from Germany than that losses in the form of increased freight rates resulting from the existence of the war should be recoverable.

Another basic principle laid down by the Commission related to the liability of Germany for damages in the nature of interest in the case of claims allowed. The principle adopted was that no such damages were allowable where the loss had not been liquidated or the amount thereof was incapable of ascertainment by computation. Such were losses based on personal injuries, death, maltreatment of prisoners, acts injurious to health, &c. But where the loss had been liquidated or the amount thereof was capable of ascertainment with approximate accuracy by established rules of computation, not only the amount of the loss but also damages in the nature of interest from the date of the loss would be allowed. Such losses would be those arising from the seizure of, injury to, or the destruction of property.

As to the measure of damages on account of American property taken by Germany during the period of American neutrality, the Commission laid down the rule that the reasonable market value at the time of taking would be determined and that the claimant would be allowed in addition an amount equivalent to interest at 5 per cent. from the date the property was taken. From this decision the German commissioner dissented and maintained that in the case of property seized during the period of neutrality no damages in the nature of interest should be allowed, but that where awards were made they should bear interest at 5 per cent. only from their date. But the Umpire and the American commissioner pointed out that the rule contended for by the German commissioner would discriminate in favour of allied claimants whose property had been taken during the period of American neutrality, and thus penalize American claimants because of the delay of their country in entering the war. The German commissioner did not, however, dissent from the application of the rule regarding interest in the case of losses arising from the taking of American property during the period of belligerency.

The most important opinion so far rendered by the Commission was that in respect to the liability of Germany to make compensation for American lives lost

in consequence of the torpedoing of the *Lusitania*. The Commission held that Germany was under an obligation to make full compensation for all lives so lost. In determining the amount of money which in each case would be regarded as proper compensation to the claimant the Commission adopted the following formula :

> " Estimate the amounts (*a*) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (*b*) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (*c*) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates, reduced to its present cash value, will generally represent the loss sustained by claimant."

In making these estimates the Commission took into consideration such factors as the age, sex, condition and station in life, occupation, habits, mental and physical capacity and earning power of the deceased ; the probable duration of his life ; the probable increase or decrease in his earning capacity had he lived ; the age, sex, health, condition and station in life and probable life expectancy of the claimant ; and the extent to which the deceased, had he lived, would have applied his earnings to his personal expenditures from which the claimant would have derived no benefits.

On the other hand, neither the physical pain nor the mental anguish which the deceased may have suffered at the time of his death would be considered as elements of damage ; nor would the amount of insurance on his life, collected by the claimant, be taken into account in computing the damages ; nor would any exemplary, punitive or vindicative damages be assessed. Counsel for Germany contended that the mental suffering of a claimant did not constitute a recoverable element of damage in death cases and argued also that life insurance paid claimants on the happening of the death of the deceased should be deducted in estimating the claimant's loss. Regarding the first contention, the Commission admitted that it was manifestly impossible to compute with any degree of accuracy the amount which would reasonably compensate an injured man for suffering excruciating and prolonged pain, but that constituted no reason why he should not receive reparation therefor, measured by rules as nearly approximating accuracy as human ingenuity could devise. Mental suffering, it said, is a fact just as real as physical suffering and susceptible of measurement by the same standards. The courts of France as well as those of various American states, it added, have always held that it is a proper element to be taken into consideration in actions brought for injuries resulting in death.

Regarding the German contention that in determining the net loss there should be deducted the amount of life insurance which the claimant had received, the Commission declared that it was opposed to all American decisions as well as the more recent decisions of the English courts ; it was also based upon a misconception of the essential nature of life insurance and the relations of the beneficiaries thereto. The claimant's rights under an insurance contract existed prior to the commission of the act complained of, and prior to the death of the deceased. The mere fact that the act complained of hastened the death of the insured could not inure to Germany's benefit.

> " If it be said that the acceleration of death secures to the claimants *now* what might otherwise have been paid to others had deceased survived claimants, and that therefore claimants may *possibly* have benefited through Germany's act, the answer is that the law will not for the benefit of the wrongdoer enter the domain of speculation and consider the probability of probabilities in order to offset an absolute and certain contract right against the uncertain damages flowing from a wrong."

As to the contention of American counsel that " exemplary " or " punitive " damages should be assessed against Germany, the Commission declared that such words when applied to damages were misnomers. The concept of "damages" implied reparation for losses suffered or for wrongs done ; the superimposition of a penalty in addition, with the qualifying words " exemplary " or " punitive," was a confusion of terms. Moreover, there was no precedent in which an arbitral tribunal had ever assessed such " damages " against a sovereign State in favour of a claim presented by another State on behalf of one of its nationals. Finally, the Commission declared that it was without power to make such an award under the terms of the Treaty of Peace with Germany since there was nothing in the Treaty to indicate any intention on the part of the United States to exact penalties of Germany for her wrongful acts. Applying a well-known rule of treaty construction the Commission held that the Treaty being framed for the benefit of the United States should be strictly construed and in favour of Germany whenever there was doubt as to its meaning. The Treaty in question was a Treaty of Peace ; there was no place in it for vindictive or punitive provisions and none had been inserted in it. The imposition of penalties by one sovereign nation upon another was a political matter falling within the jurisdiction of the treaty-making power and was not therefore a proper subject for an arbitral tribunal.

James W. Garner.

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF INTERNATIONAL LAW IN 1923–4

CASES DEALING WITH INTERNATIONAL LAW DECIDED BY THE ENGLISH COURTS

THERE has only been one prize case of importance decided during the past year. This was the case of the *Lisa* [1] in which the Privy Council decided that where the cargo of a vessel was seized and placed in the Prize Court such court had jurisdiction to deal with all incidental matters arising out of the seizure notwithstanding that the cargo had subsequently been released from the Prize Court to those claiming to be entitled thereto. The cargo of the *Lisa* consisted of resin which was shipped at Pensacola for carriage to Kirkwall for orders to discharge at a Norwegian port. The cargo was known to both shipowners and charterers to be intended for Russia, and was to be transported across Sweden. When the vessel arrived at Kirkwall it was not known whether the Swedish Government would give a licence for the transportation through Russia, and the British Government detained the vessel and her cargo until such licence should be obtained, and after some delay, as no licence was forthcoming, the cargo was seized and placed in the Prize Court and the ship released. The cargo was eventually released also, but the shipowners issued a writ in the Prize Court claiming damages from the charterers for the detention of the vessel at Kirkwall and during the discharge. The Privy Council held that the Prize Court had jurisdiction to deal with the claim, but dismissed it on the facts, holding that both the shipowners and charterers were aware of the object of the voyage and the necessity of obtaining the licence, and the voyage was frustrated by a restraint of princes.

Apart from prize law the British courts have dealt with two cases of privilege, one of diplomatic privilege, one of State immunity. In *Assurance Compagnie Excelsior* v. *Smith* [2] the Court of Appeal held that the chief of the Mail Department of the United States Embassy in London, a domiciled subject of the United States, was immune from civil proceedings in England on the ground of diplomatic privilege. In *Compania Mercantil Argentine* v. *United States Shipping Board* [3] the Court of Appeal held that the United States Shipping Board was an executive branch of the United States Government and exempt from process in the English courts.

In several cases the courts have had to consider the effect of the recognition by the British Government of the Soviet Government of Russia. In the cases of the *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* [4] and *Banque Internationale de Commerce de Petrograd* v. *Goukassow* [5] the Court of

[1] 18 *Lloyd's List Law Reports*, p. 29.
[2] 40 T.L.R., p. 105.
[3] 18 *Lloyd's List Law Reports*, p. 369.
[4] 1923. 2 K.B. 630.
[5] 1923. 2 K.B. 682.

Appeal held that the effect of the decrees issued by the Soviet Government was that private banks in Russia had ceased to exist, and that branches of these banks in other countries, where the Soviet Government was recognized, could not bring actions as the branch banks had no separate existence. In the second of these cases the action was brought by the Paris branch of the Russian bank to recover moneys due to the Paris branch with which the defendant had had dealings. The French Government had not recognized the Soviet Government and its decrees and the action would have been maintainable in France where the contract between the bank and the defendant was made. The court held, however, that the English court was bound to apply the *lex fori* as to whether the Paris branch was capable of bringing an action in England and to hold that the Paris branch had under the decrees of the Soviet Government ceased to exist and therefore could not be a party to an action. Both these cases are at present under appeal to the House of Lords.

A. E. Jackson.

SUPREME COURT OF SOUTH AFRICA

An interesting decision was given by the Appellate Division of November 30, 1923, on a point reserved on a trial for high treason of an inhabitant of the mandated territory of South Africa. The point at issue was whether the relation between the Sovereign as Mandatory and the accused as an inhabitant of the mandated area was such as to justify the conviction of the accused for high treason. The case has not yet been reported, but the following summary was prepared in South Africa.

Supreme Court of South Africa

Appellate Division

Jacobus Christian v. *Rex.*

496. November 30, 1923. Full Bench.

Criminal law—High treason—Inhabitant of mandated territory of South-West Africa—Majestas of mandatory—Treaty of Versailles—League of Nations.

Accused was indicted in a Circuit Court of South-West Africa for high treason. The indictment averred, *inter alia*, that "he was an inhabitant of the mandated territory and owed allegiance to His Majesty King George V in his Government of the Union of South Africa as the Mandatory thereof under the mandate conferred by the Treaty of Versailles upon His Britannic Majesty for and on behalf of the said Government."

Exception was, before plea, taken to the indictment as not disclosing the offence of high treason. The exception was overruled by the trial court, which reserved as a question of law whether the charge as so laid disclosed the crime of high treason. The other facts alleged were such as to constitute high treason. Held—

(1) that while it could not be said, after examining the position of the territory under the Treaty of Versailles and the Mandate given by the League of

Nations, that the Government of the territory was possessed of *Majestas* in the full sense of that term, as the territory was not a sovereign or independent State, yet *Majestas* operating internally may be sufficient to found a charge of high treason, in spite of the fact that its external operation is considerably curtailed ;

(2) that where the internal characteristics of sovereignty are present, and where a community is organized under a Government which has the powers of making laws and enforcing them, then *Majestas* adequate for the above purpose must reside in the Government of that community or in some other Government to which it is subject ;

(3) that inasmuch as the Union Government has full legislative and administrative powers within the territory, and is not itself subject to the *Majestas* of another State (for neither the League of Nations nor the Allied and Associated Powers constitute a State), the Union Government was endowed with *Majestas* sufficient to found the charge ;

(4) that such *Majestas* as formerly resided in the German Government must now reside in the Union Government as mandatory under the treaty, whereby Germany renounced the territory on terms contained in the treaty.

Question of law reserved answered in favour of the Crown.

REVIEWS OF BOOKS

Bibliotheca Visseriana. Vol. I, 1923. Vol. II, 1924. Leiden: E. J. Brill. 8vo. 157 and 157 pp. Fl. 6·50 each vol.

These two volumes are the first published under the bequest made by the late Dr. Visser to the University of Leiden for the purpose of promoting the study of public and private international law. Each volume consists of three lectures or articles, published in either French or English.

The first volume contains two courses of lectures delivered at Leiden, one by Sir Paul Vinogradoff on "Historical Types of International Law" and one by Professor Roscoe Pound of Harvard on "Philosophical Theory and International Law", and an interesting article on "La Société des Nations et l'intégrité territoriale" by the late Dr. Struycken, who, as *rapporteur* of the First Committee of the Third Assembly of the League of Nations which dealt with Article 10 of the Covenant in September 1922, was, of course, thoroughly familiar with the subject. Dr. Struycken regards the struggle which took place over Article 10 as being an example of the fundamental question whether justice is to be preferred to peace or peace to justice, and he does not conceal his preference, at any rate so far as the operations of the League of Nations are concerned, for the second solution, on the ground that if the League of Nations permits war as a means of obtaining territorial changes, even if these be justified, it is sowing the seed of its own decay.

The second volume consists of three extremely interesting courses of lectures delivered at The Hague Academy for International Law in the summer of 1923. The first, by Sir John Fischer Williams, deals with "International Law and International Financial Obligations arising from Contract," a subject whose importance has greatly increased of recent years but which does not find much place in the text-books on international law. Sir John practically confines his subject to the question of contracts of loan made either between State and State or between a State and foreign individuals, the distinction between the two classes from the point of view of international law being that cases in the first class at once produce an engagement within the sphere of that law which determines the mutual rights and obligations of States, while in the second class the matter only becomes one of international law if and when the State of the individual makes his cause its own and addresses itself diplomatically to the contracting State. As regards the latter class, Sir John deals fully with the two views which have been held in the past as to the legal position; one, which may be called the theory of the creditor countries, is represented by Lord Palmerston's circular of 1848, while the other, that of the debtor countries, became prominent as the "Drago Doctrine" in 1902. Sir John criticizes Lord Palmerston's circular from the point of view of an international jurist on the ground that it makes diplomatic and even military intervention depend on the view which one Government takes of the claims of its subjects against

another Government, without the character and amount of such claims being submitted to any judicial tribunal. On the other hand, he repudiates entirely the main legal propositions involved in the Drago doctrine, which he states as follows :

> " (1) Foreign bonds do not represent a contractual obligation of the issuing state to the bondholder comparable to the obligation arising from a private contract. (2) The issue of a foreign bond is, like the issue of money, the act of the sovereign authority which has the same legal freedom to repudiate its apparent obligation on the bond as it has to depreciate its currency. (3) Sovereignty or a sovereign state being subject to no control, when sovereignty is in question there can be no denial of justice because no court has jurisdiction."

He agrees, however, with Dr. Drago's object, which was to prevent the compulsory and immediate recovery by force at any given moment of the debts of a borrowing State at the sole discretion of the State of the creditor, and he approves of the practical solution which was found in the Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts of 1907. He anticipates that the establishment of the Permanent Court of International Justice will strongly re-enforce the authority of this Convention, and he discusses the view which the Court is likely to take when it has to deal with a position which really amounts to the bankruptcy of a State. In conclusion he makes the interesting suggestion, which he illustrates by the recent agreement for the funding of the British debt to America and the agreement of June 16, 1922, between the Mexican Government and the International Committee of Bankers in Mexico containing the arrangements for the foreign bonded debt of that country, that in future the claims of creditor States and the claims of foreign bondholders will be regarded as governed in respect of their enforcement by the same legal principles, and that pecuniary contractual claims against a State will be dealt with by the same methods and on the same principles whether the creditor be a State or a foreign individual.

The second article in this volume consists of a course of lectures on " La Responsabilité des Etats " by Professor de Visscher, who divides his subject into the legal foundations of the international responsibility of States and the general conditions of such responsibility ; the principal practical applications of State responsibility ; the reasons which afford a defence to States in such cases, and the sanctions by which international responsibility is enforced. The subject is one which, as Professor de Visscher points out, has until recently been insufficiently studied by international lawyers, although it forms a not inconsiderable part of the ordinary work of the Foreign Offices of the world, and these lectures give a clear and adequate account of the general position of the subject. Professor de Visscher divides the cases in which the responsibility of a State arises into those where such responsibility is direct or indirect, but the only cases which he places in the second class are those of federal States and protecting States ; he regards the case where a State is held responsible for the acts of individuals as being one of direct responsibility.

Finally, we have Professor van Eysinga on " Les Fleuves et Canaux Internationaux." After preliminary observations of a general nature, Professor van Eysinga deals with the following questions : what rivers and canals are inter-

national; what States have the right to free navigation on these international waterways, and what navigation is free; and he discusses the obstacles in the way of free navigation and the administration of international waterways. Professor van Eysinga does not conceal his opinion that in some respects the latest instruments dealing with this question, the peace treaties and the Barcelona Convention, represent a set-back from the stage that had been previously reached. It is interesting to note that he still maintains the view that it was not the intention of Article 5 of the Treaty of Paris of 1814 and Article 109 of the Final Act of Vienna to extend the right of navigation to non-riparian Powers.

If the standard of these two volumes is maintained, Dr. Visser's bequest will have added a valuable contribution to the literature of international law.

W.

Prize Cases decided in the United States Supreme Court, 1789–1918. Including also cases on the instance side in which questions of Prize Law were involved. Prepared in the Division of International Law of the Carnegie Endowment for International Peace, under the supervision of James Brown Scott, Director. 3 vols. 1923. Oxford: At the Clarendon Press. 8vo. xlvi + 2,182 pp. (63*s.* net.)

Many times during the sittings of the Prize Court during the late war, Counsel were at a loss for copies of the Reports of the American prize cases, and would have welcomed such an edition as that which has now been prepared under the direction of Dr. James Brown Scott, the indefatigable Director of the Division of International Law of the Carnegie Endowment for International Peace. The Preface is dated from Paris in July 1919, and indicates two reasons for the appearance of these volumes. The first reason given is the likelihood of the constitution at no distant date of an International Court of Justice which may be called upon to decide questions of prize law; the second refers to Article 440 of the Treaty of Versailles under which the Allied and Associated Powers reserve the right to examine the decisions of the German Prize Courts. Whether these reasons may be thought to have as great weight to-day as they appear to have had in 1919 is a matter on which opinions may well differ, but the permanent value to students of international law, and of prize law in particular, of such a collection as is contained in these three volumes cannot be overestimated. Admirably printed and fully indexed, they contain 2,182 pages, together with a short historical introduction on the beginning of prize appeals in the United States. A certain number of the cases are not, strictly speaking, prize cases, but they all deal with matters in which questions of prize law are involved, and their inclusion increases the value of the collection.

It is impossible even to glance through these volumes without appreciating the extent of the contribution which the courts of the United States have made to the law of nations, probably the most important being the decisions during the Civil War of 1861–5, when the doctrine of Continuous Voyage was extended to the carriage of contraband. The cases of the *Springbok*, the *Bermuda* and others were largely relied on and followed by the Prize Courts of this country and of France during the late war, and it appears to be impossible to accept the conclusions of Dr. Baty in his paper read before the Grotius Society on

October 9, 1923, that the question of the validity of the doctrine of Continuous Voyage is not concluded by the events of the late war, nor by the "isolated and protested incidents which have occurred since 1855." The last case reported (excluding eight appeals of the years 1781 and 1782 in an Appendix), is that of the *Appam*, which concludes a continuous series extending over a period of one hundred and fifteen years.

A. Pearce Higgins.

La Décision de la Société des Nations concernant les Iles d'Aland. Par H. A. Colijn. 1923. Amsterdam. Drukkerij Holland. 8°. 175 pp.

This is a careful and exhaustive account of the Aaland Islands dispute settled by the League of Nations. The author narrates the historical matters leading up to the dispute, describes the geographical and diplomatic importance of the islands, and deals very fully with the juridical power of the League in the matter. The work forms a useful contribution to the gradually increasing store of what may be called League of Nations jurisprudence.

C. M. Picciotto.

The Romance of the Law Merchant. By Wyndham A. Bewes. With a foreword by the Right Hon. Lord Justice Atkin. 1923. London: Sweet & Maxwell. $8\frac{3}{4} \times 5\frac{3}{4}$. ix + 148 pp. (7*s.* 6*d.*)

The foreword contributed to this book by Lord Justice Atkin points out the appositeness of the title. There is no contradiction in terms involved in the juxtaposition of romance with the law merchant, the law, that is, regulating the intercourse of merchants of divers nations with each other. In this book, alike scholarly and fascinating in its sweep of imagination and literary charm, Babylonians, Phoenicians, Jews, and Arabs pass before us in the pageant of the migration of commerce from East to West. The meeting of men of all nations in the fairs and markets of medieval Europe caused to be evolved a simple and efficacious code of commercial dealing—a sort of lowest common factor of the law and codes prevailing at the time—which became the law merchant. Mr. Bewes has clearly shown the origin and significance of this law by insisting at every turn upon the practical necessity for rules of law and procedure which from the nature of things had to be clear, universal, devoid of technicalities, and instant of execution. This is an excellent little book, marked by great learning and perception

C. M. Picciotto.

Histoire des violations du Traité de Paix. Par Dr. Lucien-Graux. Tome 3me. 12 novembre 1921–31 décembre 1922. 1923. Paris: Les éditions G. Crès et Cie. 16°. 512 pp. Br · 12 fr.

The first two volumes of this work were reviewed in our last issue. They dealt with matters from the Armistice down to the third anniversary in 1921. The present volume brings matters up to the end of 1922. Its style and method are the same as those adopted in the previous volumes. It is again to be noticed

that the author, though starting with the idea of narrating the German violations of the Treaty of Versailles, has diverged into a general narrative of events arising in Europe since and in consequence of the Treaty. This divergence is more marked in the present volume, which, except in the matter of reparation—no doubt a very large exception—contains no charges against the Germans other than that of general ill-feeling towards France and a desire for revenge.

As to reparation, the line which the writer takes is that all the life and all the actions of Germany have been devoted to one object—that no payment should be made to the Allies. To use his own phrase, "all this third volume reposes and turns on this psychological axis."

The book supplies an exhaustive narrative of the international events of the fourteen months with which it deals; but as in the previous volumes, facts and documents of very unequal importance are indifferently mentioned. Extracts from serious State papers are found side by side with declamatory paragraphs from French newspapers, the refrains of German drinking-songs, the fact that English plays are popular in German theatres, and what an unnamed German officer (rank not stated) said to an English journalist. There is a certain amount of grumbling against Great Britain and the United States and the Bolsheviks of Russia, Italy and the neutral Powers being hardly mentioned.

As in Volume II, there is an interesting chapter on the subject of Alsace-Lorraine, and the writer's commentaries and exhortations to his Government as to the necessity of conciliation and patience in those regions are conceived in the best spirit.

The conferences of Washington, Cannes, Genoa, and The Hague form the subjects of the first four chapters. The results of the conference at Washington are extremely displeasing to the writer. He says that France was struck by her own Allies out of the list of great naval Powers, "naval hegemony" being established for Great Britain in Europe and for Japan in the East. After discussion of these conferences come Germany's attitude to the Treaty, indemnities, Alsace and Lorraine, the movement towards a monarchical restoration, the repair of devastations, the spirit of revenge, the military forces and economic position of Germany, the condition of her former colonies, the trial of war criminals, and German action in Russia.

The writer then takes up his narrative of events in the ceded countries and in the States of Central and Eastern Europe, and concludes with a chapter on the conference at Lausanne. In this chapter he seems to write as if British policy in the Near East was governed entirely by the question of petrol. As he has to leave off when the final arrangements with Turkey had not been made, he has denied himself the pleasure of indicating the accuracy of the prophecy which he so aptly made in his second volume—that matters would end in a redrafting of the Treaty of Sèvres and the re-establishment of a strong Turkey which may effect a dangerous alliance with Germany.

On the whole, it may be said that if any one wishes to trace back any speech, writing, or event of whatever importance or unimportance, bearing on relations between France and Germany during the period covered by this book, he is almost certain to find it. It is a very complete collection of material, arranged as anything French would be, in thoroughly systematic order.

PHILLIMORE.

The Saar Controversy. By W. R. Bisschop. 1923. London : Sweet & Maxwell. $8\frac{3}{4} \times 5\frac{3}{4}$. v + 186 pp.

The Treaty of Versailles made provision for three experiments in international government in the cases of mandated territories, Danzig and the Saar Basin. In each case the experiment has taken a distinct and separate form and Dr. Bisschop's learned essay suggests that the system of government adopted in the Saar Basin should serve rather as a warning than as an example for the future. The territory has been placed under the trusteeship of the League of Nations, while its actual government until 1934 is vested in a Commission of five members representing the League. The Governing Commission has a double function to perform—to ensure the rights and well-being of the population and to guarantee to France complete freedom in working the Saar mines ceded to her by Germany—and it is equipped for the purpose with full legislative, executive, and administrative powers.

It is a depressing commentary on the Treaty that the inhabitants were given no voice in the framing of the Constitution, nor any control over the Commission ; their elected representatives, if heard at all, are heard only in a consultative capacity. The Constitution is, in fact, as Dr. Bisschop points out : " the negation of the principle of self-determination and of the individual rights of the inhabitants."

The experiment thus started under a handicap and the only hope for its success lay in the interpretation put by the Commission on its power and on close co-operation between it and the population. But even when the elected representatives have been heard their advice has more often than not been ignored or rejected, and matters reached a climax with the issue of the notorious decrees of March 7, 1923, involving the complete surrender of the liberty of the subject, and of May 2, 1923, suppressing peaceful picketing.

Moreover, in the Governing Commission itself, all executive power is vested in the President, M. Rault, a Frenchman who unfortunately appears to regard himself primarily as a representative of France and not of the League of Nations. As France is given the duty of protecting the interests of the Saar inhabitants abroad, there is an inevitable tendency for the home and foreign affairs of the territory to be treated primarily from the point of view of French interests.

The Council of the League held an inquiry into the administration of the territory on July 6, 1923, without hearing the representatives of the Saar inhabitants, and expressed its high consideration for the work accomplished by the Commission. It is difficult, however, to endorse the Council's view. All who watch with interest and friendly anxiety the development of the League will be indebted to Dr. Bisschop for his exhaustive and critical survey of one of its problems. It is by such helpful criticisms that the way is opened for progress in international government. No experiment based on a denial of constitutional rights and liberties can hope to succeed, but that lesson has apparently yet to be learned by the Council of the League.

MALCOLM M. LEWIS

L'Abrogation de la neutralité de la Belgique : ses causes et ses effets. Étude d'histoire diplomatique et de droit public international. Par André Roussel le Roy. 1923. Paris : Les Presses Universitaires de France. 8°. 224 pp. Br. : 10 fr.

The title of this book is misleading. One expects a careful study of the very difficult and complicated situation in which the Treaties of 1839 have been left owing to the fact that the revision of them contemplated during the Paris Conference has in fact not been concluded. M. le Roy, however, devotes the first three chapters of his book not to this subject but to a re-statement of the whole question of Belgian neutrality before the war ; in this he is going over old ground and he contributes nothing fresh to it. It is not until page 128 that he gets to the real subject and his treatment of this, where he had an opportunity for contributing something new and important, is of little value. His whole argument is invalidated by the fact that he starts from the assumption that Belgian neutrality had been suppressed at Paris and, as he says, " cette suppression avait été consacrée par l'article 31 de ce Traité (28 juin 1919)." This of course is gravely incorrect. The Treaty of Versailles does not abrogate Belgian neutrality ; all that it does is to secure the assent of the Germans to any revision of the Treaties which might be made. As is well known, there has since then been no formal document issued dealing with the matter, and in consequence the whole situation is very obscure. M. Le Roy gives an incomplete account of what has since happened, but he never faces the urgent problem of what the present legal situation is.

J. W. H.

Le Droit pénal international et sa mise en œuvre en temps de paix et en temps de guerre. Par Maurice Travers. Tome IV, 1921. Tome V, 1922. Paris : Recueil Sirey. 8°. 766 et 757 pp. 30 fr. par vol.

The three first volumes of this extremely important work have been the subject of successive articles in this Year Book.[1]

The volumes now under review are as full of interesting matter as their predecessors. The first subject discussed is the question as to the conditions under which acts connected with the administration of the criminal law of any State may be done outside the territorial limits of that State. The author is of opinion that international law, even in the absence of international conventions relating to the subject, sanctions such acts in the following cases : (1) when the act is required to be done in an uncivilized country or in a country having no established government ; (2) on the open sea or in such aerial regions as are not subject to any territorial jurisdiction ; (3) in a country occupied by the troops of the State whose criminal law has to be enforced.

As regards the last mentioned instance of extra-territorial criminal jurisdiction the author does not distinguish between an occupation in the course of war and an occupation under the terms of a treaty of peace (whether expressly authorized, as, for instance, the Allied occupation of the territory west of the Rhine, or undertaken as a measure for the enforcement of reparation claims, as,

[1] 1921–2, pp. 226–9 ; 1922–3, pp. 223–4.

for instance, the French and Belgian occupation of the Ruhr area). The last-mentioned occupation could not have been foreseen when the volume dealing with the matter was issued, but the Rhineland occupation had, of course, begun and it would have been interesting to become acquainted with the author's views on this subject. The instances which he gives of the exercise of the right in question are all instances of occupation in the case of war or warlike operations.

In the next place M. Travers enumerates certain international conventions by means of which the right to exercise extra-territorial jurisdiction in criminal matters is mutually conceded by the contracting Powers within specified limits. The fishery conventions, the convention relating to submarine cables, as well as those relating to the white slave traffic, are referred to as examples of such conventions. The recent treaty between the Governments of Great Britain and of the United States authorizing the last mentioned Government to exercise the right of search outside of the limits of its territorial waters will, no doubt, be referred to in the next edition of the work under review.

The extra-territorial jurisdiction exercised in Protectorates and in countries subject to " capitulations " is, of course, also referred to.

One of the most valuable parts of the work deals with international co-operation in the administration of criminal law. Such co-operation manifests itself by acts of " legal aid " (communication of records, letters of request as to taking of evidence, service of process, &c.), but its most important function is the mutual extradition of persons accused of criminal acts. The part dealing with the last mentioned subject occupies a large portion of the fourth volume and nearly the whole of the fifth volume. It contains an enumeration and analysis of the various international extradition treaties as well as a comparative statement of the provisions of municipal law by means of which the operation of the extradition treaties is rendered practicable.

In the concluding section the author expresses his views on some recent events raising problems of international criminal law. His views on Article 227 of the Treaty of Versailles constituting a special tribunal for the trial of the Emperor William are of special interest. He says : " L'inculpation de l'ex-Kaiser Guillaume II pour des faits que nulle loi pénale ne réprimait a constitué une innovation réelle, une rupture avec les principes constamment admis." The author's observations on the functions of the League of Nations and on the possibilities of an International Criminal Court are equally characterized by independent and careful thought.

The work will be invaluable as a book of reference and its usefulness is substantially increased by an excellent alphabetical index.

ERNEST J. SCHUSTER.

Grundriss des Privaten und Öffentlichen Rechts. Band XV, *Völkerrecht.* Von C. Schaeffer und Dr. H. Brode. 1.–4. Aufl., 1922. Leipzig : C. L. Hirschfeld. 8°. iii + 128 S. Mk. 2·25.

This book belongs to a well-known series of cramming books and is admirably adapted for its main purpose. It will also be of considerable use to many teachers of international law, and not less to persons like the present writer, who from time to time desire to obtain a bird's-eye view of the many ramifications

of the subject and of the many conflicts of opinion as to general principles no less than on particular applications of the same.

The scholastic forms in which the general rules are expressed are sometimes in curious contrast with the somewhat cynical way in which their practical application is commented on. The following statement as to the character of war may be quoted as an instance.[1]

> "War is a legal relation within the domain of the law of nations (ein völkerrechtliches Rechtsverhältnis). (1) The commencement, the carrying out (methods of warfare) and the end are governed by the norms of the law of nations. (2) In actual fact these norms are frequently transgressed; but they live in the inward legal conception (im Rechtsbewusstsein) of the States; every belligerent endeavours (*a*) to represent his acts as not open to objection; (*b*) to convict the enemy of violations of the law of nations."

A similar dissonance appears in the section dealing with "international tort." After defining an international tort (völkerrechtliches Delikt) as "the culpable, unlawful violation of the interest of another State standing under the protection of the law of nations" he deals[2] with the question as to what acts are "unlawful". He continues as follows:

> "No tort is committed if the State which has acted had a right to commit the act of aggression; this is the case (1) If the State affected by the act consents . . .(2) In the case of Self-Defence and Necessity (*a*) Self-Defence . . . (*b*) Necessity. Example: The German invasion of Belgium was justified by the maxim, 'necessity knows no law.' The following observations occur: (i) The applicability of the concept as to the law of nations is contested by some. In fact it will be difficult to establish in any particular case, whether the interference with the foreign State's lawful sphere of action was really compelled by necessity, and in most cases this will be denied by the opposite side. (ii) The right of every State to self-preservation is universally recognized. In so far as such self-preservation is imperilled, logic requires the admissibility of acts compelled by necessity. Compensation must be paid for the damage resulting from such acts."

The author, as is seen from these quotations, does not actually commit himself to the doctrine that the violation of the treaty guaranteeing the neutrality of Belgium was justifiable on the ground of "necessity," but he enters no protest against the doctrine, and the plea of "self-preservation" which he sanctions as a justification of acts of aggression is as elastic as the plea of "necessity." It is to be regretted that young students for whom the book under review is primarily intended should not be warned against a kind of casuistry, which, if universally recognized, would lead to the bankruptcy of international law.

ERNEST J. SCHUSTER.

[1] p. 87.

[2] p. 55.

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Finland. Agreement between the United Kingdom and Finland relative to the disposal of the estates of deceased seamen, signed at Helsingfors, Dec. 14, 1923. (*Treaty Series No.* 7, 1924.) [*Cmd.* 2042.] 2*d.* (2½*d.*)

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[1] Feb. 1, 1923–Feb. 29, 1924. Published by H.M. Stationery Office, Kingsway, London, W.C. 2.

The figures in parentheses indicate the price including postage.

Abbreviations: [*Cmd.*], Papers by Command; *S.R. & O.*, Statutory Rules and Orders.

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—— See also *Germany*, *Turkey*.

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—— See also *China*.

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Morocco. See *Tunis*.

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Turkey. Agreement between the British and French Delegations at Lausanne regarding Art. 34 of the Treaty of Lausanne of July 24, 1923 (Egyptian Nationality), signed at Lausanne, July 24, 1923. (*Treaty Series No.* 18, 1923.) [*Cmd.* 1947.] 2*d.* (2½*d.*)

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—— Lausanne Conference on Near Eastern Affairs, 1922–3. Records of proceedings and draft terms of peace (with map). (*Turkey No.* 1, 1923.) [*Cmd.* 1814.] 30*s.* (31*s.*)

—— Notes regarding certain concessions in territories detached from Turkey, exchanged between British and French Delegates at Lausanne, July 24, 1923. (*Treaty Series No.* 17, 1923.) [*Cmd.* 1946.] 2*d.* (2½*d.*)

—— Treaty of Peace with Turkey and other instruments signed at Lausanne on July 24, 1923, with agreements between Greece and Turkey signed on Jan. 30, 1923, and subsidiary documents forming part of the Turkish Peace Settlement. (*Treaty Series No.* 16, 1923.) [*Cmd.* 1929.] 8*s.* (8*s.* 3½*d.*)

United States. Agreement for the renewal of the Arbitration Convention between the United Kingdom and the United States of America of April 4, 1908, signed at Washington, June 23, 1923, together with Notes exchanged at the time of signature. (*Treaty Series No.* 8, 1924.) [*Cmd.* 2044.] 2*d.* (2½*d.*)

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White Slave Traffic. International Convention for the Suppression of the Traffic in Women and Children. Opened for signature at Geneva from Sept. 30, 1921 to March 31, 1922. (*Treaty Series No.* 26, 1923.) [*Cmd.* 1986.] 6*d.* (6½*d.*)

United States.[1]

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Permanent Court of International Justice. Address by Charles E. Hughes, Secretary of State, delivered before American Society of International Law, Washington, D.C., April 27, 1923. (1923.) i+16 pp. (State Dept.)

[1] May 1, 1923—Feb. 29, 1924. Published by the Government Printing Office, Washington, D.C.

—— Address of President of the United States at St. Louis, June 21, 1923. (1923.) ii+12 pp. (President of U.S.)

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SUMMARY OF EVENTS[1]

May 1, 1923—April 30, 1924.

(Together with dates of earlier events not previously noted.)

Compiled by the British Institute of International Affairs.

Abbreviations.

Cmd., Great Britain, Parliamentary Papers. *L'E. N.*, *l'Europe Nouvelle.* *L. N. M. S.*, *League of Nations Monthly Summary.* *L. N. O. J.*, *League of Nations Official Journal.* *L. N. T. S.*, *League of Nations Treaty Series.* *Sver.*, *Sveriges Överenskommelser med Främmande Makter.* *T.*, *The Times.*

Afghanistan.

1923, June 5. Commercial agreement concluded with Great Britain, supplementing treaty of friendship of Nov. 22, 1921. [*Cmd.* 1977.] Ratifications exchanged at London, Aug. 4, 1923.

Austria.

1923, Jan. 18. Agreement concluded with Czecho-Slovakia at Vienna concerning frontier relations.

May 15. Ratifications exchanged of extradition agreement of March 27, 1922, with Luxemburg.

July 14. Ratifications exchanged at Budapest of arbitration agreement with Hungary of April 10, 1923.

Nov. 14. Arbitration agreement concluded with Poland at Warsaw.

1924, Jan. 28. Treaty of friendship and consular agreement concluded with Turkey.

Belgium.

1922, June 21. Convention concluded with Great Britain concerning legal proceedings in civil and commercial matters. [*Cmd.* 2069]. Ratifications exchanged, Feb. 26, 1924.

1923, June 28. Aerial navigation agreement concluded with Denmark at Copenhagen. Ratifications exchanged, Aug. 15, 1923.

Aug. 7. Agreement concluded with the Netherlands at Brussels providing for reciprocal regulations for naval inspection.

Aug. 8. Convention concluded with Great Britain extending existing extradition conventions between the two countries to the Belgian Congo and British Protectorates in Africa. [*Cmd.* 2026.] Ratifications exchanged, Oct. 15, 1923.

Aug. 31. League of Nations Council approved modification of boundary between British and Belgian mandated territories in East Africa proposed in notes from British and Belgian Governments of Aug. 3, 1923. [*Cmd.* 1974].

Dec. 31. Kisaha territory (E. Africa) ceded to Belgium by Great Britain.

Bulgaria.

1923, May 5. Agreement concluded with Belgium and France concerning issue of bonds in French francs for settlement of debts in virtue of Sections 3–8 of Part IX of Treaty of Neuilly.

May 31. Agreement concluded with France at Sofia concerning Bulgarian private debts to French creditors.

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[1] References to commercial and technical agreements are in general omitted. The information given has been collected from newspapers and other sources, and it has not been possible in every case to test its accuracy. References in brackets indicate where texts are to be found.

June 9. M. Stambulisky's Government overthrown by revolutionary movement; M. Stambulisky killed, June 14. July 5, diplomatic relations renewed with new Government by Czecho-Slovakia, Serb-Croat-Slovene Kingdom and Roumania.
Sept. Communist insurrection in North and East. Sept. 26–8, decisive battle won by Government forces.
Nov. 19. Frontier convention concluded with Roumania.
Nov. 23. Naturalization agreement concluded with United States. Ratifications exchanged, April 4, 1924.
Nov. 26. Agreements signed by Serbo-Bulgarian Commission at Sofia concerning judicial and medical assistance and payment by Bulgaria for requisitions made during the war.

Costa Rica.

1923, Oct. 18. Award issued by Arbitrator, Chief Justice Taft, in favour of Costa Rica in dispute with Great Britain concerning Amary Concession.

Czecho-Slovakia.

1922, May 8. Extradition agreement concluded with Germany at Prague. Ratified by Germany, Sept. 25, 1923.
1923, March 8. Agreement concluded with Hungary concerning frontier stations and railway traffic in execution of Art. 205 of the Treaty of Trianon.
May 7. Defensive military treaty concluded with Roumania for three years renewing that signed on April 23, 1921.
July 5. Aerial convention with France of Oct. 31, 1922, ratified by Czecho-Slovakia.
July 13. Agreement concluded with Hungary at Prague concerning double taxation and pre-war debts.
Oct. 4. Ratifications exchanged of extradition and judicial convention with Germany of May 8, 1922.
1924, Feb. 10. Two protocols signed by Czecho-Slovakia and Hungary concerning application of decision of League of Nations of April 23, 1923, relating to frontiers in Salgo-Tarjan district.
March 12. Settlement reached of dispute between Czecho-Slovakia and Poland concerning frontiers in Jaworzyna district by acceptance by League of Nations Council and representatives of the interested Governments of proposals of Delimitation Commission for new frontier line in Spisz region.

Denmark.

1923, April 21. Agreement concluded with Finland by exchange of notes of Feb. 8 and April 21, 1923, at Copenhagen, concerning exemption from military service. (*L. N. T. S.* XVII.)
June 14. Ratifications exchanged at Copenhagen of aerial convention with Germany of April 25, 1922.
June 15. Ratifications exchanged at Moscow of diplomatic and commercial agreement of April 23 with Union of Soviet Republics.
July 14. Agreement concluded with Poland by exchange of notes of July 10 and July 14, concerning exemption from military service. (*L. N. T. S.* XIX.)

Egypt.

1923, July 5. British martial law, in force since 1914, abolished.
July 5. Act of Indemnity agreement concluded with British Government. [*Cmd.* 1998.]
July 18. Agreement concluded with Great Britain by exchange of notes concerning conditions of service, etc., of foreign officials. (*L. N. T. S.* XVII.)

Esthonia.

1923, June 27. Provisional commercial agreement and agreement concerning reparation for war damage concluded with Germany at Talinn.
Nov. 1. Four agreements signed with Latvia at Reval: (1) treaty of defensive alliance; (2) agreement for customs union; (3) convention concerning reciprocal claims; (4) supplementary frontier agreement. Ratifications exchanged, Feb. 21, 1924.
Nov. 2. Treaty of defensive alliance signed with Lithuania at Reval.

Finland.

1922, July 7. Convention concluded with Russian Soviet Republic concerning former governmental property mentioned in note to Art. 22 of Treaty of Dorpat of Oct. 14, 1920. (*L. N. T. S.* XIX.)

Oct. 28. Conventions concluded with Russian Soviet Republic at Helsingfors concerning maintenance of river channels and regulation of fishing on frontiers between Finland and Russia and free transit of Russian nationals through Petsamo territory. (*L. N. T. S.* XIX.)

1923, May 1. Debt funding agreement between Finland and United States formally executed at Washington, and pending ratification became provisionally operative. Payments under agreement to begin on June 15, 1923.

June 5. Provisional agreement concerning navigation on the Neva concluded with Russian Soviet Republic at Moscow. (*L. N. T. S.* XVII.)

July 28. Convention concluded with Russian Soviet Republic at Helsingfors concerning maintenance of order in the Gulf of Finland.

Oct. 12. Agreement concluded with Sweden by exchange of notes of Aug. 11 and Oct. 12 concerning establishment of lighthouses and mist signals. (*Sver.*, 1923, No. 20.)

Nov. 29. Extradition convention concluded with Sweden at Helsingfors. (*Sver.*, 1924, No. 2.)

Fiume.

1923, Aug. 31. Mixed Italo-Serb Commission at Rome reached agreement for administration of Fiume by Mixed Commission composed of representatives of Italy, Serb-Croat-Slovene Kingdom and Free State of Fiume.

1924, March 16. Official celebration of incorporation of Fiume in Kingdom of Italy.

France.

1922, June 27. Ratifications exchanged of political agreement with Poland of Feb. 19, 1921.

Dec. 26. Exchange of notes of Dec. 15, 16, 25, and 26 with Great Britain concerning interpretation of Art. 12 of protocol concerning the New Hebrides signed at London, Aug. 6, 1914. [*Cmd.* 1827.]

1923, March 7. Exchange of notes with Great Britain ratifying proposals contained in report dated Feb. 3, 1922, of Boundary Commission appointed to fix a Syro-Palestinian frontier. [*Cmd.* 1910.]

March 22. Newfoundland and Palestine adhered to agreement between France and Great Britain of Feb. 2, 1922, concerning legal procedure in civil and commercial matters. [*Cmd.* 2034.]

May 24. Agreement concluded with Great Britain by exchange of notes regarding nationality of British nationals born in Tunis. [*Cmd.* 1899.]

June 29. France ratified convention with Italy of Sept. 12, 1919, fixing frontiers between Tripolitania and French Africa.

July 19. Arbitration treaty with United States renewed for five years.

July 24. Agreements concluded by exchange of notes with Great Britain at Lausanne concerning concessions in territories detached from Turkey and Article 34 (Egyptian nationality) of the Treaty of Peace with Turkey of the same date. [*Cmd.* 1946, 1947.]

Aug. 29. Arbitration agreement with Great Britain of Oct. 14, 1903, renewed. [*Cmd.* 1960.]

Sept. 29. Declaration signed at Paris by British and French representatives concerning oyster fisheries outside territorial waters in seas lying between coasts of Great Britain and France. [*Cmd.* 1996.]

Oct. 29. Protocol signed at London by French and German representatives providing for resumption of German collaboration in work of Mixed Arbitral Tribunal. Nov. 2, further protocol signed concerning resumption of work between offices of the two countries dealing with verification and compensation.

Nov. 13. Agreement concluded with Great Britain extending to British and French mandated territories in Africa existing extradition treaties between the two countries. [*Cmd.* 2034.]

Nov. 23. Convention concluded at Paris between United Kingdom, France, Italy, and Japan, concerning assessment and reparation of damage suffered by their nationals in Turkey. [*Cmd.* 2028.]

Dec. 22. Convention concluded with Uruguay at Montevideo for final cancellation of loan by Uruguay to France in 1918.

Dec. 28. Protocol signed by French and British representatives in London defining frontier between Anglo-Egyptian Sudan and French Equatorial Africa. Further protocol signed on Jan. 10, 1924, defining frontiers of Wadai and Darfur (E. Central Africa.) Confirmatory declaration signed, Jan. 21, 1924.

1924, Jan. 25. Treaty of friendship and alliance with Czecho-Slovakia signed at Paris. (*L'E. N.*, 2.2.24.)

April 4. Agreement signed in Paris extending to United States advantages granted under French Mandate in Syria to countries which are Members of the League of Nations.

Germany.

1923, April 5. Agreement concluded with Great Britain at London concerning German debts and property in China. [*Cmd.* 1875.]

April 23. Agreement concluded with Russian Soviet Republic at Moscow in execution of Article I (*b*) of the Treaty of Rapallo of April 16, 1922, concerning merchant ships.

May 31. Political agreement concluded with Lithuania at Dresden for the settlement of outstanding questions.

Oct. 20. Principal public buildings in Aix-la-Chapelle seized by separatists and a Rhineland Republic proclaimed. Provisional Government set up at Coblenz, Oct. 27.

Oct. 30. British Government informed French and Belgian Governments that it considered separatist movement contrary to terms of Treaty of Versailles. Nov. 2, French Government replied declaring that terms of treaty were not involved and denying responsibility for events in Rhineland.

Nov. 9. Conference of Ambassadors sent Note to Germany regarding consequences of return of ex-Crown Prince to Germany. Nov. 10, ex-Crown Prince left Wieringen for Germany; Allied protests handed to Netherlands Government. Nov. 21, Conference of Ambassadors sent two notes to Germany: (1) regarding presence of ex-Crown Prince in Germany; (2) concerning resumption of military control operations. (*T.* 22.11.23.)

Dec. 22. Formation of autonomous Government of Palatinate announced by French Government.

1924, Feb. 13. Inter-Allied Rhineland High Commission appointed special Inter-Allied Committee to consider measures for re-establishment of order in Palatinate. Feb. 17. Proclamation posted to effect that Palatinate Kreistag Committee accepted all responsibility for maintenance of order and Autonomous Government ceased to exercise any governmental functions.

March 4. Treaty of friendship concluded with Turkey at Angora, providing for resumption of diplomatic relations and the conclusion of consular and commercial agreements.

Greece.

1923, July 24. Convention concerning compensation to be paid to Greece by Allied nations signed at Lausanne by France, Great Britain, Greece, and Italy.

Aug. 27. General Tellini, President of the Commission for the Delimitation of the Albanian frontiers, and four members of his suite, murdered at Janina. Aug. 29, ultimatum presented to Greece by Italy. Aug. 30, Greece replied, refusing to comply with certain of the demands. Aug. 31, Italian fleet occupied Corfu. Sept. 1, Greece submitted question to League of Nations. Sept. 6, Note containing points for discussion sent by League to Conference of Ambassadors. Sept.7, note containing terms sent by Conference of Ambassadors to Greece; accepted by Greece, Sept. 10. Sept. 14, Conference of Ambassadors fixed Sept. 27 as time limit for evacuation of Corfu. Sept. 26, Conference of Ambassadors decided that certain conditions of their note of Sept. 7 had not been fulfilled by Greece and that Greece should pay whole indemnity of 50 million lire claimed by Italy. Sept. 29, Corfu evacuated. (*L'E. N.*, 6.10.23.)

Dec. 16. Elections for National Assembly resulted in Venizelist majority. Dec. 17, Cabinet decided to ask King to leave Greece. Dec. 20. Admiral Konduriotis took oath as Regent. 1924, Jan. 4, M. Venizelos reached Athens; elected President of the Assembly, Jan. 6; accepted Premiership, Jan. 11; resigned on account of health Feb. 4. Kaphandaris Ministry formed Feb. 5; resigned, March 8. March 9, Papanastosiou Government formed. March 25, Assembly proclaimed

dethronement of Glücksburg dynasty and constitution of a Republic, latter conditionally on confirmation by a plebiscite. April 13, plebiscite held, resulting in favour of a Republic. April 24, Republic recognized by Great Britain ; also recognized by Turkey and Italy.

Hedjaz.

1924, March 11. King Husein proclaimed Caliph at Shuneh.

Hungary.

1923, Oct. 10. Portuguese ratification of Treaty of Trianon of June 4, 1920.

Dec. 18. Treaty of friendship signed with Turkey at Budapest, providing for diplomatic representation of Hungary at Angora. Ratifications exchanged, March 20, 1924.

International Labour Office.

1923–4. Sessions of Governing Body held as follows : Nineteenth, June 12–13, 1923 ; Twentieth, Oct. 15–18, 1923 ; Twenty-first, Jan. 29–31, 1924 ; Twenty-second, April 8–10, 1924.

Oct. 22–9. Fifth session of International Labour Conference held at Geneva. Recommendation concerning general principles of factory organization and six resolutions adopted.

Iraq.

1924, March 25. Four subsidiary agreements with Great Britain : (1) financial ; (2) judicial ; (3) military ; (4) employment of British officials.

Italy.

1923, Aug. 14. Arbitration agreement with Great Britain of Feb. 1, 1904, renewed for five years by exchange of notes. [*Cmd.* 1978.]

Oct. 16. Ratifications exchanged at Rome of naturalization convention with Nicaragua of Sept. 20, 1917.

1924, Jan. 27. Two treaties concluded with Serb-Croat-Slovene Kingdom at Rome : (1) settlement of Fiume question ; (2) pact of friendship and mutual defensive alliance. (*L'E. N.*, 16.2.24.) Ratifications of (1) exchanged, Feb. 22, 1924.

Japan.

1923, Aug. 23. Arbitration treaty with United States of May 5, 1908, renewed for five years.

Latvia

1922, Aug. 16. Protocol signed at Riga with Russian Soviet Republic concerning exchange of prisoners and interned persons.

1923, June 22. Treaty of commerce and navigation concluded with Great Britain at Riga. [*Cmd.* 1935.] Ratifications exchanged, Nov. 5, 1923.

League of Nations.

1923–4. Sessions of the League of Nations Council held as follows : Twenty-fifth (general questions), July 2–7, 1923 ; Twenty-sixth (Italo-Greek conflict and general questions), Aug. 31–Sept. 29, 1923 ; Twenty-seventh (Reconstruction of Hungary and general questions), Dec. 10–20, 1923 ; Twenty-eighth (Settlement of Polish-Czecho-Slovak frontier and Memel questions, interpretation of the Covenant and general questions), March 10–15, 1924.

Sept. 3–29. Fourth Session of the Assembly of the League. Abyssinia and Irish Free State admitted to the League. (Text of Resolutions and Recommendations : *L. N. O. J. Spec. Supp.* No. 11 ; Records : *L. N. O. J. Spec. Supp.* Nos. 13–19.)

Oct. 15–Nov. 3. International Customs Conference held at Geneva. International convention and protocol relating to the simplification of customs formalities concluded on Nov. 3. (*L. N. O. J.*, Dec., 1923.)

Nov. 15–Dec. 9. Second General Conference on Communications and Transit held at Geneva. Four draft conventions and statutes adopted relating to : (1) international régime of railways ; (2) international régime of maritime ports ; (3) transmission in transit of electric power ; (4) development of hydraulic power affecting more than one State. (*L. N. O. J.*, Jan., 1924.)

1924, Jan. 18–24. Special Commission of Jurists, set up by League Council to consider certain questions regarding the interpretation of the Covenant and other points of international law formulated by the Council in connexion with the Italo-Greek crisis, met at Geneva. Agreement reached and approved by League Council on March 13. (*L. N. M. S.*, April 1924, p. 53.)

Feb. 14–25. Naval Sub-Commission of the Permanent Advisory Commission for Military, Naval, and Air Questions met at Rome to consider the application of the principles of the Washington Naval Treaty to States not signatory to that Treaty, whether or not Members of the League.

Liechtenstein.

1923, March 29. Agreement concluded with Switzerland at Berne for customs union. Ratifications exchanged, Dec. 28, 1923.

June 10. Agreement concluded with Vorarlberg (Austria) for customs union.

Dec. 28. Agreement concluded with Switzerland concerning regulations for foreigners in the two countries.

Lithuania.

1923, July 3. Negotiations with Conference of Ambassadors for Statute of Memel reopened at Paris. Sept. 28, no agreement having been reached as to terms of draft convention, Conference of Ambassadors referred dispute to League of Nations Council. March 14, 1924, League Council accepted report of special Commission of Investigation appointed by it on Dec. 19; draft convention creating an autonomous régime for Memel under the sovereignty of Lithuania accepted by Lithuanian representative but referred to Polish Government by Polish representative.

Mexico.

1922, May 17. Agreement concluded with Great Britain by exchange of notes of May 13 and 17 for transmission of diplomatic mails. (*L. N. T. S.* XIV.)

1923, Feb. 21. Mexican Government recognized by Colombia and diplomatic relations resumed after lapse of twenty-five years.

Aug. 31. Government formally recognized by United States and diplomatic relations renewed.

Sept. 8. General claims convention signed with United States in Mexico City. Special convention relating to claims for losses through revolutionary acts signed Sept. 10. Special convention ratified by Mexico, Dec. 27, 1923; general convention, Jan. 2, 1924; both conventions ratified by United States Senate, Jan. 23, 1924.

1924, Jan. 18. Convention concluded with Nicaragua for exchange of diplomatic mails.

Muscat.

1922, Feb. 11. Treaty concluded with Great Britain at Muscat prolonging for one year the treaty of friendship, commerce and navigation of March 19, 1891. (*L. N. T. S.* XVII.) Further prolongation for one year, Feb. 11, 1923. [*Cmd.* 2034.]

Netherlands.

1923, March 29. Additional protocol to protocol of Jan. 21, 1921, concerning accession of Netherlands to the modification introduced by the Treaty of Versailles into the Mannheim Convention of 1868, signed at Paris by Belgium, France, Great Britain, Italy, and the Netherlands. Netherlands adhered to the modifications, Sept. 8, 1923. [*Cmd.* 1905 and 2034.]

Norway.

1922, Nov. 15. Agreement concluded with Russian Soviet Republic concerning terms of relief credit to Russia.

1923, May 26. Aerial navigation agreement concluded with Sweden at Stockholm. Ratifications exchanged, July 30, 1923. (*L. N. T. S.* XVII.)

1924, Jan. 8. Norwegian Government denounced treaty of Nov. 2, 1907, between France, Russia, Great Britain, Germany, and Norway, assuring independence and territorial integrity of Norway.

Permanent Court of International Justice.

1923, June 15–Sept. 15. Third session (ordinary) held at The Hague. Judgment given, Aug. 17, in the case of the *S.S. Wimbledon*. Advisory opinions given on Eastern Carelia question, July 23; questions relating to German settlers in Poland, Sept. 10; question concerning acquisition of Polish nationality, Sept. 15.

Nov. 12–Dec. 6. Fourth session (extraordinary) held at The Hague. Advisory opinion given on Polish-Czecho-Slovak frontier question, Dec. 6.

Poland.

1923, Jan. 27. Convention concluded with Germany at Posnan concerning common administration of dikes in territory of Marienwerder.

May 4. Juridical convention concluded with Serb-Croat-Slovene Kingdom at Belgrade.

May 26. Postal and telegraphic convention concluded with Russian Soviet Republic at Moscow.

July 23. Diplomatic and consular convention concluded with the Serb-Croat-Slovene Kingdom at Lausanne.

July 23. Three treaties concluded with Turkey at Lausanne: (1) treaty of friendship; (2) juridical convention; (3) agreement concerning communications and commercial questions. Ratifications exchanged, March 17, 1924.

1924, April 26. Railway convention concluded with Russian Soviet Republic.

Portugal.

1923, Sept. 5. Treaty of arbitration with United States renewed for five years.

Reparation (*Germany*).

1923, May 2. Note containing new German reparation offer sent to Allies. (*L'E. N.*, 26.5.23.) French and Belgian notes rejecting offer presented May 6; British reply, May 13; Italian reply, May 13; Japanese reply, May 15. June 7, German memorandum making new proposals delivered to Allied Governments. [*Cmd.* 1943.] June 10, French note on new offer delivered to British and Belgian Governments. (*L'E. N.*, 25.8.23.) June 13, British note to French and Belgian Governments asking for further information concerning requirements. Belgian reply received July 3, French reply, July 6 (dated June 14.) [*Cmd.* 1943.]

July 20. British draft of joint Allied note in reply to German note of June 7 dispatched to Allied Governments and United States. July 30, Belgian and French replies received; Italian reply, Aug. 2; Japanese reply, Aug. 3. [*Cmd.* 1943]. Aug. 11, further British note to France and Belgium. [*Cmd.* 1943.] French reply, Aug. 21 (*Temps*, 23.8.23.) Belgian reply, Aug. 27. (*T.*, 29.8.23.)

Aug. 13. German note to Reparation Commission stating that payment in kind to countries not participating in the occupation of the Ruhr would cease. (*T.*, 14.8.23.)

Sept. 26. Proclamation to German people announcing abandonment of passive resistance in the Ruhr.

Oct. 12. British Government asked United States Government if it would collaborate in appointment of an expert committee to inquire into Germany's capacity to pay. British notes also sent to France, Italy, and Belgium concerning appointment of committee. Oct. 16, United States agreed to proposal. French reply, Oct. 26, accepted proposal with reservations concerning scope of inquiry. Oct. 31, British note to Allies regarding invitation to United States. Nov. 9, United States Government announced that it would not participate in an inquiry limited in accordance with the French proposal.

Oct. 24. German note to Reparation Commission stating that Germany was willing in principle to resume reparation payments, but Government unable at present to finance operations. Reparation Commission asked to make fresh investigation of Germany's capacity to pay. (*L'E. N.*, 17.11.23.) Oct. 30, Reparation Commission decided to postpone reply pending agreement regarding committee of experts. Nov. 13, Reparation Commission considered German note and decided to hear German representatives. Hearing begun, Nov. 23. Nov. 30, Commission agreed on appointment of two expert committees, one to deal with questions concerning German budget, and measures to be taken to stabilize the currency, the other with the means of estimating the amount of exported capital and of bringing it back into Germany.

Dec. 3. United States Government officially notified of Reparation Commission's plan for two expert committees and invited to consider possibility of appointing

two American members. Dec. 11, announced at Washington that Government would view favourably participation of American experts but could not appoint representatives.

Dec. 15. Germany submitted to France and Belgium fresh proposals for reopening negotiations concerning the Ruhr. French reply, Dec. 16, stated that Government was prepared to confer with German Government but reserved right to consult Allies on matters concerning them. Dec. 24, further German note concerning communications in the Ruhr and other technical questions. French and Belgian replies, Jan. 11, 1924. Further German note, Feb. 11, 1924.

Dec. 21. Reparation Commission decided to ask American representatives to sit without official character on first committee (German budget). Dec. 26, invitations issued to French, British, Belgian, and Italian members of both committees. Jan. 14, 1924, first committee began work at Paris ; second committee began work Jan. 21. Jan. 31, both committees met for first time in Berlin ; first committee formed two sub-committees dealing respectively with the budget and currency. Feb. 18, meetings of both committees began again in Paris. April 9, reports of both committees issued in Paris. April 16, German Government notified Reparation Commission of its willingness to collaborate in the experts' plan. April 17, Reparation Commission approved within the limits of its powers the conclusions set forth in the reports and agreed to adopt the methods recommended ; reports transmitted to Governments concerned. April 24, replies received from British, Belgian, and Italian Governments ; from French Government, April 25 ; from Japanese and Serb-Croat-Slovene Governments, April 28.

1924, Feb. 23. Agreement concluded between British and German Governments by which rate of levy under the German Reparation (Recovery) Act was reduced from 26 to 5 per cent. in respect of goods imported on or after Feb. 26, 1924.

March 6. Agreement concluded between Germany and Serb-Croat-Slovene Kingdom concerning resumption of reparation deliveries, subject to ratification by Reparation Commission.

Reparation (*Hungary*).

1923, May 23. Hungarian rehabilitation plan approved by Reparation Commission. Hungarian Government protested against decision. Oct. 17, Reparation Commission agreed in principle to waiving of liens on certain Hungarian property and resources with a view to Hungary's financial assistance and reconstruction and asked the League of Nations Council to prepare in agreement with the interested countries a plan for reconstruction involving the exercise of control by the League. Nov. 20–28, Financial Committee of the League of Nations met in London and agreed on main outlines of reconstruction scheme. Dec. 20, Financial Committee presented report to the Council, which approved the scheme and the text of two protocols : (1) assuring the political independence and territorial integrity of Hungary ; (2) concerning the drawing up of a programme of reform and reconstruction. Jan. 21, 1924, Financial Committee's scheme approved by Hungarian Sub-Committee of League of Nations ; Feb. 21, approved by Reparation Commission. March 14, Both protocols signed, first by France, Italy, Great Britain, Roumania, Serb-Croat-Slovene Kingdom, Czecho-Slovakia, and Hungary, second by Hungary only (*L.N.M.S. Supp.*, May, 1924).

Dec. 11. Agreement concluded between Hungary and Great Britain at Paris, modifying agreement of Dec. 20, 1921, concerning periodical instalments payable by Hungary. [*Cmd.* 2045.]

Reparation (*Bulgaria*).

1923, June 6. Agreement between Bulgarian Government and Inter-Allied Commission of March 21, 1923, ratified by Bulgarian Sobranje.

1924, March 28. Agreement concluded with Inter-Allied Commission concerning payment of costs of armies of occupation.

Roumania.

1923, Oct. 23. Protocol signed at Belgrade prolonging for three years defensive alliance of June 7, 1921, with Serb-Croat-Slovene Kingdom.

Nov. 24. Convention concluded with Serb-Croat-Slovene Kingdom providing for delimitation of frontiers. Ratified by Roumania, Jan. 2, 1924.

Nov. 26. Convention concluded with Russian Soviet Republic relating to skirmishes on Dniester frontier.

Spain.

1923, Sept. 12. Military coup d'état organized by General Primo de Rivera. Sept. 14, Military Directorate formed.

Sweden.

1924, March 5. Supplementary declaration to air navigation agreement with Great Britain of Feb. 16, 1921, signed at Stockholm by representatives of the two countries. (*Sver.*, No. 3, 1924.)

Tangier.

1923, Dec. 11. Tangier Port Convention signed by British, French, and Spanish delegates at Paris. Dec. 18, convention by which Tangier becomes new zone in Morocco under sovereignty of Sultan signed by British and French representatives and by Spanish representative conditionally on his Government's approval. Feb. 7, convention finally signed by Spanish representative. [*Cmd.* 2096.]

Turkey.

1923, July 24. Peace Treaty signed at Lausanne by British Empire, France, Italy, Japan, Greece, Roumania, Serb-Croat-Slovene Kingdom, and Turkey, together with thirteen other conventions and declarations, including Straits Convention, convention concerning Thracian frontier and commercial convention. [*Cmd.* 1929.] Aug. 14, Straits Convention signed by Russia. Aug. 23, Peace Treaty and conventions ratified by Turkish National Assembly; by Great Britain, April 15, 1924. Also ratified by Australia.

Aug. 6. Two treaties concluded with United States at Lausanne: (1) treaty of amity, establishing general and commercial relations (2) extradition treaty.

Oct. 2. Constantinople evacuated by Allied troops.

Oct. 29. Republic proclaimed at Angora. Mustapha Kemal Pasha elected President.

Dec. 24. Agreement for a Claims Commission concluded with United States.

1924, March 3. Motion for abolition of Caliphate passed in Grand National Assembly. Caliph left Constantinople same evening.

April 20. Constitutional charter passed by Grand National Assembly.

Union of Soviet Socialist Republics.

1922, May 31. Protocol signed by Russian Soviet Republic and Mongolia at Ougra concerning property and movables.

June 29. Economic convention concluded by Russian Soviet Republic with Khiva. Ratified by Russia, Sept. 25, 1922; by Khiva, Oct. 12, 1922.

Aug. 9. Economic convention concluded between Russian Soviet Republic and Boukhara at Moscow. Ratified by Russia, Aug. 25, 1922; by Boukhara, Sept. 17, 1922.

1923, April 23. Agreement concluded with Denmark for *de facto* recognition of Union of Soviet Republics. Ratifications exchanged, June 8, 1923.

July 6. Constitution of Soviet Republics, drawn up in virtue of Union of Soviet Republics of Dec. 30, 1922, approved by Central Executive Committee. (*L'E.N.*, 8.9.23.)

Oct. 26. Ratifications exchanged at Berlin of treaty of Nov. 5, 1922, with Germany concerning application to Republics comprised in Union of Soviet Republics of Russo-German treaty of Rapallo.

Dec. 13. Union of Soviet Republics recognized by Poland by exchange of notes.

1924, Jan. 21. Death of Lenin. Feb. 3, Rykoff appointed by Congress of Soviets of Union of Soviet Socialist Republics to succeed Lenin as Chairman of Council of Peoples' Commissars.

Feb. 1. Union of Soviet Republics recognized *de jure* by British Government. Representatives invited to conference at London to discuss basis of a complete treaty to settle all outstanding questions. Russian reply, Feb. 8. (*T.*, 2.2.24, 10.2.24.)

Feb. 7. Commercial agreement, including provision for *de jure* recognition of Union of Soviet Republics, concluded with Italy at Rome.

Feb. 15. Agreement concluded at Christiania with Norway for *de jure* recognition of Union of Soviet Republics.

March 8. Agreement concluded with Greece for *de jure* recognition of Union of Soviet Republics.

March 15. Agreement concluded with Sweden for *de jure* recognition of Union of Soviet Republics.
April 14. Anglo-Soviet conference opened in London.

United States.

1923, June 19. Formal war debt agreement concluded with Great Britain at Washington.
June 23. Convention concluded with Great Britain at Washington extending arbitration treaty of April 4, 1908. [*Cmd.* 2044.] Ratifications exchanged Dec. 29, 1923.
1924, Jan. 23. Convention concluded at Washington with Great Britain providing for search of British vessels suspected of infringing liquor laws beyond the three-mile limit. Ratifications exchanged, May 22, 1924. [*Cmd.* 2063.]
Feb. 18. United States ratified treaty of Feb. 9, 1920, relating to Spitzbergen.

Venezuela.

1923, Jan. 10. Venezuela ratified arbitration treaty concluded with Bolivia at Caracas, April 12, 1919.

GENERAL INTERNATIONAL AGREEMENTS.[1]

Aerial Navigation: Convention. (Oct. 13, 1919; Protocol, May 1, 1920.)
Ratifications: Czecho-Slovakia,* Nov. 23, 1923; Italy (convention), March 13, 1923; (protocol), April 10, 1923.
Accessions: Bulgaria, July 5, 1923; Persia; Uruguay, Sept. 6, 1923.
Arbitration Clauses: Recognition of validity in commercial matters—Protocol. (Geneva, Sept. 24, 1923.)
Signatures: Belgium, Brazil, France, Germany, Great Britain, Greece, Italy, Lithuania, Panama, Uruguay.
Arms and Munitions: Traffic—Convention and Protocol. (St. Germain-en-Laye, Sept. 10, 1919.)
Accessions: Argentine Republic, May 30, 1923; Esthonia, Oct. 17, 1923; Uruguay, Sept. 6, 1923.
Austria: Reconstruction of—Protocols. (Geneva, Oct. 4, 1922.)
(1) Political declaration concerning assistance for financial reconstruction; (2) Arrangement for guaranteeing credits.
Ratification: Czecho-Slovakia (1, 2), Feb. 23, 1923.
Accessions: Belgium (1, 2), June 12, 1923; Denmark (2), June 11, 1923; Netherlands (2), June 11, 1923; Sweden (2), June 23, 1923.
China: Treaties. (Washington, Feb. 6, 1922.)
(1) Principles and policies; (2) Customs tariff.
Ratification: Portugal (1, 2).
Accession: Spain (1).
— Extra-territoriality—Resolution. (Washington, Dec. 10, 1921.)
Accession: Denmark, May 5, 1923.
Civil Procedure: Convention. (The Hague, July 17, 1905.)
Notice that convention is binding: Austria, May 30, 1922.
Commercial Statistics: Convention. (Dec. 31, 1913.)
Accession: Belgian Congo, Dec. 18, 1922; Hungary, Jan. 21, 1924.
Communications and Transit: Conventions. (Barcelona, April 20, 1921.)
(1) Freedom of transit (convention and statute); (2) Navigable waterways (convention, statute, and additional protocol); (3) Right to a flag of States having no sea coast (declaration).
Ratifications: Austria (1, 2), Nov. 15, 1923; Czecho-Slovakia * (1), Oct. 26, 1923; Denmark * (2); France (3); Greece (1), Feb., 1924; Italy * (2); Japan (1, 3), Feb. 20, 1924; Latvia (1), Sept. 29, 1923, (3), Feb. 12, 1924; Norway (1, 2, 3), Sept. 4, 1923; Roumania (1), Sept. 5, 1923.
Accessions: Colombia (2), April 7, 1923; Malay States (1, 2), Aug. 22, 1923; Palestine (2), Jan. 24, 1924; Siam (1, 2, 3), Nov. 29, 1923.

[1] The place and date of signature are given in brackets. The date given for ratification is that of deposit except when indicated thus: * when the date is that of ratification only.

COMMUNICATIONS AND TRANSIT: Conventions. (Geneva, Dec. 9 1923).
(1) International régime of railways (convention and statute); (2) International régime of maritime ports (convention and statute); (3) Transmission in transit of electric power (convention); (4) Development of hydraulic power (convention).
Signatures: Austria (1, 3, 4), Belgium (1, 2, 3, 4), Brazil (1, 2), British Empire (1, 2, 3, 4), Chile (1, 2, 3, 4), Danzig (1, 3, 4), Denmark (1, 2, 3, 4,) Esthonia (1, 2), Finland (1), Germany (1), Greece (1, 2, 3, 4), Hungary (1, 2, 3, 4), Italy (1, 2, 3, 4), Japan (1, 2), Lithuania (1, 2, 3, 4), Netherlands (1, 2), Poland (1, 3, 4), Roumania (1), Salvador (1, 2), Serb-Croat-Slovene Kingdom (1, 2, 3, 4), Spain (1, 2, 3), Uruguay (1, 2, 3, 4), Dec. 9, 1923.
COPYRIGHT: Convention. (Montevideo, Jan. 11, 1889.)
Accession: Austria, Dec. 3, 1923.
— Revised Convention. (Berlin, Nov. 13, 1908; Protocol, Berne, March 20, 1914.)
Accession: Canada, Jan 1, 1924.
CUSTOMS FORMALITIES: Convention. (Geneva, Nov. 3, 1923.)
Signatures: Austria, Belgium, Brazil, Chile, Egypt, Finland, France, Germany, Great Britain, Greece, Italy, Lithuania, Luxemburg, Morocco (French Protectorate), Portugal, Serb-Croat-Slovene Kingdom, Siam, Spain, South Africa, Switzerland, Tunis, Uruguay, Nov. 3, 1923; Japan; Netherlands, Feb. 21, 1924.
CUSTOMS TARIFF: Publication—Convention. (Brussels, July 5, 1890.)
Accession: Latvia, Feb. 22, 1922.
DOCUMENTS: Exchange of—Conventions. (Brussels, March 15, 1886.)
(1) International exchange of official documents and scientific and literary publications; (2) Exchange of the "Journal Officiel" and of Parliamentary records and documents.
Accessions: Dominican Republic, June 13, 1923; Hungary, July 30, 1923; Latvia, March 27, 1924; Roumania, June 5, 1923.
ELBE NAVIGATION; Convention. (Dresden, Feb. 22, 1922.)
Ratifications: Belgium, March 30, 1923; Czecho-Slovakia, June 21, 1923; France, March 31, 1923; Germany, June 30, 1923; Great Britain, Dec. 13, 1922; Italy, March 31, 1923.
— Additional Protocol. (March 31, 1923.)
Ratification: Great Britain *, Dec. 29, 1923.
EMIGRATION: Protocol. (Rome, July 25, 1921.)
Ratifications: Italy, Dec. 22, 1922; Poland, Feb. 27, 1922; Roumania, April 7, 1922; Austria, Bulgaria, Czecho-Slovakia, Greece, Hungary.
FOOD ANALYSIS: Conventions. (Paris, Oct. 16, 1912.)
(1) Unification and presentation of statistics; (2) Creation of an international chemistry bureau.
Accession: Spain (1).
HOSPITAL SHIPS: Declaration. (The Hague, Dec. 21, 1904.)
Notice that declaration is binding: Austria, June 6, 1922; Hungary, June 24, 1922.
HYDROGRAPHIC BUREAU: International. (Monaco, July, 1921.)
Accessions: Egypt, March 25, 1922; Italy; United States.
INDUSTRIAL PROPERTY: Protection—Convention. (Paris, March 20, 1883; Revisions: Brussels, Dec. 14, 1900; Washington, June 2, 1911.)
Accessions: Canada, Sept. 1, 1923; Cuba, Jan. 3, 1922.
— False Indications of origin of goods: Revised Agreement. (Washington, June 2, 1911.)
Accession: Cuba, Jan. 3, 1922.
— Trade Marks Registration: Convention. (Madrid, April 14, 1891; Revisions: Brussels, Dec. 14, 1900; Washington, June 2, 1911.)
Accession: Esthonia, Feb. 12, 1924.
LABOUR: Draft Conventions. (Washington, Nov. 28, 1919.)
(1) Limitation of hours of work; (2) Unemployment; (3) Employment of women before and after child-birth; (4) Night work of young persons employed in industry; (5) Minimum age for admission of children to industrial employment; (6) Night work of women.
Ratifications: Poland (2, 4, 5), Dec. 19, 1923; South Africa (2), Feb. 20, 1924; Switzerland (2, 4, 5, 6), Oct. 9, 1922.
— Draft Conventions. (Genoa, June 15–July 10, 1920.)
(1) Minimum age for admission of children to employment at sea; (2) Unemploy-

ment indemnity in case of loss or foundering of the ship ; (3) Facilities for finding employment for seamen.
Ratification : Poland (1, 2, 3), Dec. 19, 1923.
— Draft Conventions. (Geneva, Oct. 25–Nov. 19, 1921.)
(1) Minimum age for admission of children to employment in agriculture ; (2) Rights of association in agriculture ; (3) Workmen's compensation in agriculture ; (4) Use of white lead in painting ; (5) Application of the weekly rest in industry ; (6) Minimum age for admission of young persons to employment as trimmers and stokers ; (7) Compulsory medical examination of children and young persons employed at sea.
Ratifications : Czecho-Slovakia (1, 2, 4, 5), Aug. 31, 1923 ; Esthonia (5), Nov. 29, 1923 ; Finland (2, 5), June 19, 1923 ; Great Britain (2, 3), Aug. 6, 1923 ; Japan (1), Dec. 19, 1923 ; Poland (1–7), Dec. 19, 1923 ; Roumania (5, 6, 7), Aug. 18, 1923 ; Sweden (1, 2, 3, 4), Nov. 27, 1923.
League of Nations : Amendments to Articles 4, 6, 12, 13, 15, 16, 26 of Covenant—Protocols. (Geneva, Oct. 5, 1921.)
Ratifications : Albania (Arts. 4, 6), Jan. 3, 1924 ; Australia * (Art. 16) ; Belgium, Sept. 28, 1923 ; Brazil (Arts. 4, 6—additional paragraph—12, 13, 15, 16—fourth paragraph—, 26—second paragraph), July 7, 1923 ; Bulgaria (Art. 6), Czecho-Slovakia, Sept. 1, 1923 ; Esthonia, Sept. 7, 1923 ; France (Arts. 6, 12, 13, 15, 26), Aug. 2, 1923 ; Great Britain (Art. 12), July 5, 1923, (Art. 16) * ; Greece (Arts. 12, 13, 15, 26), Aug. 20, 1923 ; India * (Art. 16) ; Italy (Art. 6) ; Latvia (Art. 6), Sept. 29, 1923, (Arts. 4, 12, 13, 15, 16—second and third paragraphs), Feb. 12, 1924, (Art. 26), Dec. 10, 1923 ; Portugal, Oct. 5, 1923 ; Roumania, Sept. 5, 1923 ; Spain (Art. 6), Jan. 31, 1924 ; Uruguay, Jan. 31, 1924.
Limitation of Naval Armament : Treaty. (Washington, Feb. 6, 1922.)
Ratification : France, July 11, 1923. (Ratifications exchanged at Washington—France with reservations—Aug. 17, 1923.)
Literary and Artistic Works : Protection of—Revised Convention. (Berne, Nov. 13, 1908.)
Accession : Canada, Feb. 1, 1924.
— Additional Protocol. (March 20, 1914.)
Accession : Greece, March 10, 1924.
Maritime Conventions. (Brussels, Sept. 23, 1910.)
(1) Collisions ; (2) Salvage at sea.
Accessions : Finland (1, 2), Aug. 28, 1923 ; Spain (1, 2), Dec. 30, 1923.
Matches : White Phosphorus—Convention. (Berne, Sept. 26, 1906.)
Accession : China, Dec. 6, 1923.
Motor Vehicles : International Circulation of—Convention. (Paris, Oct. 11, 1909.)
Accessions : Alderney, Aug. 5, 1923 ; Liechtenstein, March 26, 1923 ; Morocco (French zone).
Notification that convention is binding : Hungary, July 13, 1923.
Obscene Publications : Repression—Convention. (Paris, May 4, 1910.)
Accessions : Bulgaria, May 18, 1923 ; Roumania, Jan. 9, 1924 ; Spain, Sept. 13, 1923.
— Convention. (Geneva, Sept. 12, 1923.)
Signatures : Albania, Austria, Belgium, China, Colombia, Czecho-Slovakia, France, Great Britain, Greece, Hungary, India, Italy, Latvia, Lithuania, Netherlands, Persia, Poland, Serb-Croat-Slovene Kingdom, Siam, Spain, Switzerland, Uruguay, Sept. 12, 1923 ; Cuba, Denmark, Sept. 13, 1923 ; Luxemburg, Sept. 14, 1923 ; Costa Rica, Haiti, Sept. 15, 1923 ; Honduras, New Zealand, Sept. 20, 1923 ; Bulgaria, Roumania, Jan. 9, 1924 ; Brazil, Danzig, Finland, Germany, Irish Free State, Monaco, Panama, Portugal, Salvador, South Africa, Turkey.
Opium Convention : Second Protocol. (The Hague, Jan. 23, 1912.)
Ratifications : Dominican Republic, June 7, 1923 ; Switzerland,* March, 1924.
Accessions : Costa Rica, Sept. 6, 1923 ; Ecuador, Aug. 23, 1923 ; Monaco, May 1, 1923 ; New Hebrides, Nov. 7, 1923.
Pan-American Conventions. (Santiago, May 3, 1923.)
(1) Arbitration ; (2) Trade-marks ; (3) Merchandise classification ; (4) Customs documents.
Ratifications : Brazil * (1–4), Jan. 19, 1924 ; United States (2, 3, 4), Feb. 18, 1924.

PATENTS : Creation of a central bureau of—Convention. (Paris, Nov. 15, 1920.)
Ratification : Czecho-Slovakia,* June 30, 1922.
PERMANENT COURT OF INTERNATIONAL JUSTICE : Protocol and Optional Clause. (Geneva, Dec. 16, 1920.)
Signature : Hungary, Aug. 1, 1923.
Ratifications : Italy (Protocol) ; Latvia (Protocol), Feb. 12, 1924.
PHARMACOPOEIAL FORMULAS FOR DRUGS : Convention. (Brussels, Nov. 29, 1906.)
Notification that convention is binding : Hungary, Aug. 3, 1922.
PHYLLOXERIC CONVENTION : (Berne, Nov. 3, 1881 ; Supplement, Berne, April 15, 1889.)
Accession : Hungary, May 29, 1922.
POSTAL : Universal Postal Union. (Madrid, Nov. 30, 1920.)
(1) Universal postal convention ; (2) Letters, &c., of declared value ; (3) Money orders ; (4) Parcel post ; (5) Payment on delivery ; (6) Postal subscriptions to newspapers ; (7) Postal transfers.
Ratifications : Brazil (1, 2, 3, 4), Jan. 30, 1924 ; Denmark (1–7), July 27, 1922 ; Dominican Republic (1), Oct. 4, 1923 ; Greece (3), Dec. 31, 1923 ; Italian colonies (1–7), Aug. 1, 1923 ; Serb-Croat-Slovene Kingdom * (1), March 31, 1924.
Accessions : Esthonia (6), Feb. 1, 1923, (3, 5, 7), Oct. 30, 1923 ; Irish Free State (1, 2), May 14, 1923 ; Palestine (1), Oct. 5, 1923, (2), Nov. 19, 1923 ; Syria and Lebanon (1, 2, 3, 4), Oct. 30, 1923.
— Hispanic-American Convention. (Madrid, Nov. 13, 1920.)
Ratification : Paraguay, March 19, 1923.
— Radio-Telegraph Convention—Revision. (London, July 5, 1912.)
Accessions : Brunei, Sept. 13, 1923 ; Esthonia, July 1, 1923 ; Réunion, Oct. 29, 1923.
— Telegraph Convention. (St. Petersburg, July 22, 1875 ; Revision, Lisbon, June 11, 1908.)
Accessions : Irish Free State, Italian Somaliland, Lithuania, Syria and Lebanon.
PROTECTION OF BIRDS USEFUL TO AGRICULTURE : Convention. (Paris, March 19, 1902.)
Accession : Danzig, June 29, 1922.
Declaration that convention is binding : Hungary, Dec. 5, 1922.
PUBLIC HEALTH : Creation of international office—Agreement. (Rome, Dec. 9, 1907.)
Accessions : Czecho-Slovakia, Sept. 1, 1922 ; Japan, March 7, 1924.
RAILWAYS : Technical standardization — Agreement. (Berne, May 15, 1886 ; Revisions : May 18, 1907 ; Jan. 14, 1912.)
Accession : Saar Basin, Nov. 10, 1923.
Notification that agreement is binding : Hungary, May 2, 1923.
— Sealing of trucks subject to customs inspection—Agreement. (Berne, May 15, 1886 ; Additional Protocol, May 18, 1907.)
Accessions : Poland, Feb. 13, 1923 ; Saar Basin, Nov. 10, 1923.
Notification that agreement is binding : Hungary, May 2, 1923.
RED CROSS : Amelioration of the lot of the wounded and sick—Convention. (Geneva, Aug. 22, 1864.)
Accession : Austria, Jan. 27, 1924.
Notification that convention is binding : Hungary, May 1, 1923.
— Revised Convention. (Geneva, July 6, 1906.)
Accessions : Esthonia, April 15, 1922 ; Czecho-Slovakia, Finland, Haiti.
Notification that convention is binding : Hungary, May 1, 1923.
REFRIGERATION : International Institute of—Convention. (Paris, June 21, 1920.)
Ratifications : Finland, Oct. 17, 1921 ; Japan, March 4, 1924 ; Poland, May 16, 1922.
RUSSIAN REFUGEES : Certificates of identity—Agreement. (Geneva, July 5, 1922.)
Adoptions : Albania, March 21, 1923 ; Australia (with reservations), June 9, 1923 ; Chile, July 9, 1923 ; China, Nov. 29, 1923 ; Denmark, May 23, 1923 ; Germany, Jan. 6, 1923 ; Hungary (with reservations), Aug. 31, 1923 ; Japan (with reservations), July 30, 1923 ; Lithuania, Jan. 12, 1923 ; Mexico, Feb. 28, 1923 ; Poland, June 18, 1923 ; Portugal (with reservations), July 30, 1923.
SANITARY CONVENTION : (Paris, Jan. 30, 1892 ; Revisions : April 15, 1893 ; April 3, 1894 ; March 19, 1897 ; Dec. 3, 1903.)
Notification that convention is binding : Hungary, Jan. 14, 1924.

— Revised Convention. (Paris, Jan. 17, 1912.)
Ratification : Mexico, July 27, 1923.
Accessions : Danzig, June 22, 1923 ; Poland, May 12, 1923.
WEIGHTS AND MEASURES : Revised Convention. (Paris, Oct. 6, 1921.)
Ratifications : Belgium, July 28, 1923 ; Finland, Aug. 31, 1923 ; Norway, Aug. 3, 1923 ; United States, Oct. 24, 1923.
WHITE SLAVE TRAFFIC : Agreement. (Paris, May 18, 1904.)
Accession : Cuba, April 5, 1923.
— Convention. (Paris, May 4, 1910.)
Ratification : Brazil.*
Accessions : Cuba, July 9, 1923 ; Jersey, Guernsey, and Isle of Man, Sept. 21, 1923.
— Traffic in Women and Children—Convention. (Geneva, Sept. 30, 1921.)
Ratifications : Czecho-Slovakia, Sept. 29, 1923 ; Latvia, Feb. 12, 1924 ; Netherlands, Sept. 19, 1923 ; Portugal, Dec. 1, 1923 ; Roumania, Sept. 5, 1923.

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